Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

TROY BURRIS, in his official capacity as chairperson of the Arkansas Ethics Commission and JACK KEARNEY, TOM ALEXANDER, RITA LOONEY, and BEN ALLEN, in their official capacities as members of the Arkansas Ethics Commission ..... *Petitioners*

and CITIZENS FOR CLEAN GOVERNMENT ... *Intervenor*

vs.

RON RUSSELL, KENT INGRAM, WILLIAM R. AUSTIN, and ASSOCIATED INDUSTRIES OF ARKANSAS POLITICAL ACTION COMMITTEE ..... *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER ARKANSAS' $100 AND $300 PER ELECTION PER CANDIDATE CONTRIBUTION LIMITS TO CANDIDATES, ITS $200 ANNUAL CONTRIBUTION LIMIT TO APPROVED POLITICAL ACTION COMMITTEES, AND ITS $2,500 PER CANDIDATE PER ELECTION CONTRIBUTION LIMIT FROM SMALL DONOR POLITICAL ACTION COMMITTEES TO CANDIDATES VIOLATE THE FIRST AMENDMENT OR THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

LIST OF PARTIES

The parties to this case are as follows. The petitioners are Troy Burris, Chairman of the Arkansas Ethics Commission, Rita Looney, Tom Alexander, Ben Allen, and Jack Kearney, Arkansas Ethics Commissioners. The respondents are three individuals and a political action committee, Ron Russell, Kent Ingram, William R. Austin, and the Associated Industries of Arkansas Political Action Committee. The intervenor below was an organization known as Citizens for Clean Government.

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ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

Petitioners Troy Burris, in his official capacity as chairman of the Arkansas Ethics Commission, and Jack Kearney, Tom Alexander, Rita Looney, and Ben Allen, in their official capacities as members of the Arkansas Ethics Commission, respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS DELIVERED BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 146 F.3d 563 (8th Cir. 1998) and is printed in its entirety in Appendix A. The opinion of the United States District Court for the Eastern District of Arkansas, Western Division, is reported at 978 F. Supp. 1211 (E.D. Ark. 1997) and is printed in its entirety in Appendix B.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The opinion of the Eighth Circuit Court of Appeals was delivered on June 4, 1998 (See Appendix A). This petition is filed within the time allowed by law. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Section one of the Fourteenth Amendment to the United States Constitution reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Arkansas Code Annotated §§ 7-6-203(a) and (b) read as follows:

(a)(1) It shall be unlawful for any candidate for any public office, except the office of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, or for any person acting on the candidate's behalf, to accept campaign contributions in excess of one hundred dollars ($100) per election from any person.

(a)(2) It shall be unlawful for any candidate for the office of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, or for any person acting on the candidate's behalf, to accept campaign contributions in excess of three hundred dollars ($300) per election from any person.

(b)(1) It shall be unlawful for any person to make a contribution to a candidate for any public office, except the office of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, or to any person acting on the candidate's behalf, which, in the aggregate, exceeds one hundred dollars ($100) per election.

(b)(2) It shall be unlawful for any person to make a contribution to a candidate for the office of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, or to any person acting on the candidate's behalf, which, in the aggregate, exceeds three hundred dollars ($300) per election.

Arkansas Code Annotated § 7-6-203(d) reads as follows:

(d) However, an organized political party as defined in Arkansas Code 7-1-101(1) and a small donor political action committee may contribute up to two thousand five hundred dollars ($2500) to each candidate per election.

Arkansas Code Annotated § 7-6-201 reads in pertinent part:

12) A "small donor political action committee" means any person who: (A) Receives contributions from one or more individuals in order to make contributions to candidates; (B) Does not accept any contribution or cumulative contributions in excess of twenty-five dollars ($25) from any individual in any calendar year; and (C) Is registered pursuant to Arkansas Code 7-6-215 prior to making contributions to candidates. "Small donor political action committee" shall not include an organized political party, the candidate's own committee, or an exploratory committee.

Arkansas Code Annotated § 7-6-201(9) reads in pertinent part:

"Approved political action committee" means any person who:

. . .

(B) Does not accept any contribution or cumulative contributions in excess of two hundred dollars ($200) from any person in any calendar year. . . .

STATEMENT OF THE CASE

This case presents a challenge to elements of Arkansas' campaign finance and ethics laws. The petitioners (Commission) are the Arkansas Ethics Commissioners in their official capacities. The Commission is charged with administering and enforcing Arkansas' campaign finance and disclosure laws. It also investigates alleged violations of these laws. The defendant-intervenors below (intervenors or Citizens) are the Citizens for Clean Government. See Appendix B. The issues and arguments advanced here were raised by the Commission in the district and circuit courts.

The respondents are three individuals and an approved Arkansas political action committee (PAC). Ron Russell is Executive Vice-President of the Arkansas State Chamber of Commerce and the Associated Industries of Arkansas, Kent Ingram is a businessman and former state senator, and William R. Austin is a businessman. Mr. Russell and Mr. Ingram are officers of the State Chamber PAC; Mr. Russell and Mr. Austin are officers of the Associated Industries of Arkansas Political Action Committee (AIAPAC). The AIAPAC, the PAC plaintiff, is an approved PAC. Appendix B.

The respondents filed suit in the United States District Court for the Eastern District of Arkansas, Western Division, pursuant to 42 U.S.C. § 1983. They alleged that provisions in Arkansas' law violate either the First Amendment or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Principally, the plaintiffs challenged select portions of Arkansas' Initiated Act I of 1996. Act I holds that contributions to candidates for political office shall not exceed $300 for

constitutional offices[1], and $100 for all other offices per candidate per election. Ark. Code Ann. § 7-6-203. The previous limit was $1,000 per candidate per election.

Act I also established public subsidies for campaigns by allowing individuals a $50 per year tax credit and married couples a $100 per year tax credit for contributions to political campaigns, parties or PACs. Ark. Code Ann. § 7-6-222. It in addition created small donor PACs that are funded by contributions of no more than $25 per year per contributor with contributions limited to individuals only, but that may contribute up to $2,500 per election per candidate. Ark. Code Ann. § 7-6-201, 203(d)[2].

The respondents attacked each of these measures except for the tax credit. They alleged that Act I's contribution limits offend the First Amendment. They also alleged that the equal protection clause of the Fourteenth Amendment is violated by allowing Small Donor PACs to contribute $2,500 per candidate per election while limiting approved PACs to $100 and $300 contributions. The respondents also attacked one provision that is outside the measures enacted in 1996. Since 1991, Arkansas has limited contributions to approved PACs to $200 per person per year. Ark. Code Ann. § 7-6-201(9)(B). The respondents challenged this limit as a violation of their First Amendment rights.

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[1]Those offices are Governor, Lieutenant Governor, Secretary of State, State Treasurer, State Auditor, Attorney General, and Commissioner of State Lands.

[2]Act I also created independent expenditure committees and limited the amount that may be contributed to them to $500 per person per year. Ark. Code Ann. § 7-6-220(a). The respondents lacked Article III standing to pursue their challenge to this measure.

This case was tried to the bench in a seven-day trial. In its October 3, 1997, opinion, the trial court enjoined the $300 limit on contributions to constitutional officers. Appendix B The trial court also enjoined enforcement of the Act as applied to Justices of the Arkansas Supreme Court and Judges of the Arkansas Court of Appeals who are elected by popular vote. Those offices were subject to the $100 limit under Act I.

The trial court upheld the $100 limit on contributions to all other candidates. It also upheld Act I's small donor PAC provision holding that Act I does not discriminate against approved PACs to any greater degree than it does small donor PACs. Finally the trial court upheld Arkansas' long-standing limitation on contributions to approved PACs.

The respondents appealed the trial court's decisions on the $100 limits, small donor PACs, and approved PACs. The petitioners and intervenors cross-appealed the court's holdings regarding the $300 limit and the $100 limit as applied to Justices and Judges of the Court of Appeals. On June 4, 1998, the Eighth Circuit Court of Appeals issued its opinion striking down Act I's candidate contribution limits in their entirety as well as the small donor PAC limit and the limit on contributions to approved PACs.

In its opinion, the Eighth Circuit first held that Arkansas contribution limits must survive the strictest level of judicial scrutiny. Thus, the limits would only pass muster if they were supported by a compelling state interest and were narrowly tailored to meet that interest. Appendix A at A-7. The Eighth Circuit then held that only one interest is compelling in this context: "the prevention of corruption and the appearance of corruption spawned by the real or imagined

coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." Appendix A at A-9 [quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)]. The Eighth Circuit applied this basic reasoning to all three contribution limits at issue; candidate contribution limits, approved-PAC contribution limits and small donor PAC contribution limits.

The Eighth Circuit found that the Commission failed to meet this standard. It did so first with respect to the $300 and $100 limit on contributions to candidates. While the Commission had argued that evidence of perceived corruption was present, the Court rejected those arguments. It reasoned that the Commission's evidence did not show that any office holder or candidate had changed his position following a contribution or had sought to conceal a contribution, and there were no exorbitant multi-million dollar contributions in evidence. Thus, a reasonable person would not perceive any undue influence or corruption. The court also rejected the Commission's argument that corruption or its appearance could be inferred from contributions in excess of the $300 and $100 limits given Arkansas' low level of campaign finance. The Eighth Circuit also held that the limits at issue were not narrowly tailored. According to the court, given inflation, the limits at issue were simply too low to allow for meaningful participation in the elective process and vigorous advocacy.

The court next addressed the $200 limit on contributions to approved PACs. It held that the limit was so low, as a matter of law, to be different in kind from the limits approved in *Buckley*. Furthermore, contributions to PACs present far less potential for *quid pro quo* corruption than do contributions to candidates. Thus, the limit was not narrowly tailored to meet a compelling state interest.

Finally, the Eighth Circuit addressed the $2,500 limit on contributions from small donor PACs to candidates. Once again, the Eighth Circuit applied strict scrutiny to this limit. Here the court held that the higher limit was not justified because the law focused on the source of the contributions to the PAC not on the potential that the PAC itself would attempt to corrupt a candidate.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE EIGHTH CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

This Court has previously addressed when and under what circumstances political contributions may be limited. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court approved of limitations on contributions to candidates for office and announced the standard for measuring when such limitations are allowed. In *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981) (*CalMed*), this Court addressed limitations on contributions to PACs and differing limitations on contributions by entities. The Eighth Circuit departed from the standards announced in these cases in striking down the contribution limits at issue here.

1. THE EIGHTH CIRCUIT'S HOLDING REGARDING THE $100 AND $300 LIMITS ON CONTRIBUTIONS TO CANDIDATES CONFLICTS WITH *BUCKLEY*.

In *Buckley v. Valeo*, 424 U.S. 1, 26 (1976), this Court reviewed the Federal Election Campaign Act's provision limiting individual contributions to candidates for federal offices to $1,000 per election, with an overall annual limit of $25,000 by any contributor. *Id.* at 7. Those limits were upheld. An examination of this Court's reasoning and various holdings is necessary to see the error in the Eighth

Circuit's holding. First, this Court determined that limitations on contributions to candidates implicated First Amendment values. The impact, however, on both free expression and the freedom to associate was minimal. This holding was necessary because

> [a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since expression rests solely on the undifferentiated, symbolic act of contributing. . . . A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication. . . .

Id. at 21. Only when contribution limits are so low that they prevent "candidates from amassing the resources for effective advocacy" will freedom of expression be severely implicated. *Ibid.*

Likewise, with respect to free association,

> [t]he Act's contribution ceilings . . . limit one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally in efforts on behalf of candidates.

Id. at 22.

Second, this Court addressed the level of judicial scrutiny given to contribution limits to candidates. In this regard, a limitation is justified upon a demonstration of "a

sufficiently important interest" and when a State "employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25 However, this Court noted that "a court has no scalpel to probe, whether, say a $2,000 ceiling might not serve as well as $1,000. . . . Such distinctions in degree become significant only when they can be said to be differences in kind." *Id.* at 30 (internal quotations and citations omitted). Thus, while heightened scrutiny is appropriate, strict judicial scrutiny is not.

Finally, this Court addressed whether the FECA limits passed muster. Limits on campaign contributions are justified, this Court held, by a state's interest in preventing corruption or the appearance of corruption stemming from large campaign contributions. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). Those simple words, corruption or the appearance of corruption, were then given context. Actual corruption occurs when contributions are given to "secure a political *quid pro quo*." *Id.* at 26. Such activity undermines the "integrity of our system of representative democracy." *Id.* at 26-27.

Actual *quid pro quo* is not the end of the equation. "Of almost equal concern . . . is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual contributions." *Id.* at 27. Thus, it was legitimate for Congress to conclude that "the avoidance of improper influence" is necessary in order to prevent "the confidence in our representative Government" from being "eroded to a disastrous extent." *Ibid.* (internal citations and quotations omitted).

A basic analysis emerges from *Buckley*. First, it must be determined whether a contribution limit "focuses precisely

on the problem of large campaign contributions – the narrow aspect of political association where actuality and potential for corruption have been identified." *Buckley*, 424 U.S. at 30. In other words, the inquiry is whether particular legislation addresses "large" contributions. If so, the limits are acceptable as long as ample room remains for political association. Associational rights remain when the limitations leave "persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited nonetheless substantial extent" through contributions, and ample avenues remain to raise sufficient funds to allow effective advocacy on the part of candidates. *Id.* at 30. Limits may not "undermine to [a] material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties." *Id.* at 29. Stated otherwise, so long as contributors are allowed substantial participation and candidates are able to amass sufficient funds for effective advocacy, then, a contribution limit is merely different in "degree" from the limits approved by this Court and not subject to fine tuning. *Buckley*, 424 U.S. at 30.

With respect, the Eighth Circuit departed dramatically from this analysis. See also, *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 2579 (1996). First, the Eighth Circuit erred in holding that contribution limits to candidates must survive strict judicial scrutiny. This error is clearly seen through this Court's disposition of two overbreadth arguments advanced against FECA. In *Buckley*, the challengers first asserted that the limits at issue were overly broad because not all or even most large contributors seek improper influence. This Court rejected that argument because it is difficult to isolate suspect contributions and because "the interest in safeguarding against the appearance of

impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Buckley* 424 U.S. at 30.

Second, they asserted that the level itself was unrealistically low because "much more than that amount would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or officeholder." *Buckley*, 424 U.S. at 29-30. This argument was rejected with the now-famous phrase that "a court has no scalpel to probe, whether, say a $2,000 ceiling might not serve as well as $1,000. . . . Such distinctions in degree become significant only when they can be said to be differences in kind." *Id.* at 30 (internal quotations and citations omitted).

The level of scrutiny imposed by the Eighth Circuit is precisely the same as the overbreadth arguments advanced in *Buckley*. The essence of the Eighth Circuit's holding is that the State must somehow locate the perfect limit then surgically draft a statute to reflect that limit. That is what strict scrutiny requires. Under its holding limits may not be enacted if the limit plus $1.00 would not suffice as well or if the limit sweeps within its breadth contributors who do not intend to exert improper influence. It is an invitation to courts to utilize "a scalpel to probe, whether, say a" $400 limit might serve just as well as a $300 limit.

The second analytical error committed by the Eighth Circuit is in the evidentiary standard imposed on the State in order to establish the existence of its interest. The Eighth Circuit held that the Commission had the burden of proving "that there is real or perceived undue influence or corruption attributable to large political contributions in Arkansas." Appendix A at A-10. In order to meet this burden, the

Commission had to prove that a candidate or officeholder "changed his position . . . due to an intervening contribution," that there was an attempt to "conceal his contributions" from some sources, or that there had been some exorbitantly large, indeed in Arkansas illegal, contribution. Appendix A at A-12, A-13, A-14. In other words, the Commission had to show a bribe or the appearance of a bribe or an illegal contribution. Without such evidence, no "reasonable person could perceive" undue influence. Appendix A at A-11.

This evidentiary standard does not appear in *Buckley* and is clearly contra to its language. What is required of the Commission is simply to show that the limitations "focus precisely on the problem of large campaign contributions — the narrow aspect of political association where the actuality and potential for corruption have been identified." *Buckley,* 424 U.S. at 28. There is no requirement to point to some specific instance of corruption or apparent corruption under the previous limits before Act I can be justified. Contribution limits are justified in order to meet the interest in *preventing* corruption or the appearance of corruption stemming from large campaign contributions. That interest is accomplished, once again, by removing "the opportunity for abuse inherent in the process of raising large monetary contributions." *Id.* at 30. The State need not wait until some scandal surfaces to impose a reduction in limits. *Cf. Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986). Rather, it may take preemptive steps to alleviate "the possibility for corruption that may arise from large campaign contributions. . . ." *Rosentiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1820 (1997).

Even if, however, some showing of corruption or its appearance is needed, the showing required by the Eighth

Circuit is erroneous. The Eighth Circuit essentially held that a state must present evidence of a bribe, an apparent bribe or an illegal contribution. Conversely, this Court rejected the notion that illegality was the standard of proof in *Buckley*. See *Buckley* 424 U.S. at 27-28; 29-30. Rather, the correct inquiry, if any inquiry is required, is whether actions of candidates or office holders create "the appearance of improper influence" such that "confidence in the system of representative government is . . . eroded." *Id.* at 27 (internal citations and quotations omitted).

In summary, the Eighth Circuit has established a standard for reviewing campaign finance reform measures that runs counter to the mandate of this Court. The writ should issue to correct that error.

2. THE EIGHTH CIRCUIT'S HOLDING REGARDING THE $200 LIMIT ON CONTRIBUTIONS TO PACs CONFLICTS WITH THIS COURT'S PRECEDENT IN *CAL-MED*.

This Court has also addressed limitations on contributions to PACs. *Cal-Med,* 453 U.S. at 200. There, a statute limited contributions to multi-candidate political committees to $5,000 annually. The California Medical Association (CMA) challenged the statute arguing that its ability to contribute to a PAC known as CALPAC should not be limited. Such contributions, it was argued, were akin to direct expenditures by candidates and committees which this Court held could not be limited in *Buckley*. This Court disagreed.

In upholding the statute, this Court determined the level of First Amendment protection such contributions merit.

While they were not totally devoid of First Amendment protection they also were "not the sort of political advocacy . . . entitled to full First Amendment protection." *Cal-Med,* 453 U.S. at 196. The contributions at issue would not be speech by the contributor. *Id.* at 197. Rather they involved "speech by proxy." CMA and its members were fully able to expend independently "in order to advocate political views." *Id.* at 195. This conclusion was mandated by *Buckley*:

> While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of a contribution into political debate *involves speech by someone other than the contributor.*

Cal-Med, 453 U.S. at 197 (quoting *Buckley*, 424 U.S. 1, 21 (1976) (emphasis added by Court in *Cal-Med*). Thus, like contributions to candidates, contributions to PACs are not examined under strict judicial scrutiny. Such scrutiny is limited to direct expenditures by candidates and committees.

The limitations were, thus, justified on two bases.[3] So long as the limits in question would not violate the rights of a contributor to give to a candidate, they likewise would not violate his right to contribute to a PAC. *Id.* at 197. The same analytical framework established in *Buckley* would apply.

Second, the limits were justified in order to prevent the circumvention of the limits imposed on individual contributions to candidates. *Id.* at 198. CMA had argued that limits on contributions did not further the interest in preventing

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[3]This portion of the opinion is a plurality.

real or apparent corruption. *Id.* at 197. This Court rejected that notion, holding that the limit was "an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions" addressed in *Buckley*. *Id.* at 198.

The Eighth Circuit did not apply this analysis in striking down Arkansas' $200 limit on contributions to PACs. First, it held that "limits on contributions to political action committees . . . are reviewed according to a strict scrutiny standard." Appendix A at A-16 (citing *Day v. Holohan,* 34 F.3d 1356, 1365 (8th Cir. 1994). This holding is clearly contradicted by *Cal-Med.* The Eighth Circuit then held that the limit at issue was not narrowly tailored because it was too low. It based this holding on the value of a dollar today as compared to the value of a dollar in 1976 when *Buckley* was decided. No such analysis emanates from either *Buckley* or *Cal-Med.*

Finally, the Eighth Circuit held that the interest in preventing corruption or its appearance was lessened in this context. According to the Eighth Circuit, "[t]here is also less of a danger of *quid pro quo* corruption . . . when a contribution is given to a PAC that does not itself wield legislative power." Appendix A at A-17. Once again, this holding is in clear conflict with *Cal-Med.* This Court should issue the writ to correct this erroneous legal standard.

3. THE EIGHTH CIRCUIT'S HOLDING REGARDING THE SMALL DONOR PAC LIMIT CONFLICTS WITH THIS COURT'S PRECEDENT IN *CAL-MED.*

The Eighth Circuit finally struck down the provision allowing Small Donor PACs to contribute $2,500 while limiting approved PACs to $100 and $300 per election per

candidate. A Small Donor PAC, must limit itself to receiving contributions of $25 or less per year from individuals. These PACs are allowed to contribute up to $2,500 per election per candidate.

According to this Court's precedent, the PAC challenging Act I's differing limits had to prove that Act I "burdens [its] First Amendment rights . . . to a greater extent than it burdens the rights" of small donor PACs, "and that such differential treatment is not justified." *Cal-Med*, 453 U.S. at 200. In *Cal-Med*, this Court also reviewed an equal protection challenge to Federal Election Campaign Act provisions that placed no limit on contributions of corporations and labor unions to segregated political funds while placing limits on the same types of contributions from the challengers, unincorporated associations and individuals. *Id.* at 200-01. The Court found it unnecessary to address "the second question – whether the discrimination alleged . . . is justified – because [it] found no such discrimination." *Id.* at 200.[4]

The Eighth Circuit clearly did not apply this analysis. Rather, it held that "such differential treatment must be evaluated according to strict scrutiny." Appendix A at A-18. It then identified the prevention of corruption or its appearance as the only possible interests advanced by such limits.

The Eighth Circuit rejected the argument that the entities could not be examined under *Cal-Med*'s framework in curious fashion. It held that the such reasoning was "manifestly flawed" because it focused on the sources of

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[4]This portion of the opinion is an opinion for the Court.

contributions to small donor PACs instead of on the potential that the PACs themselves would attempt to exert control over a candidate. Appendix A at A-19. Thus, the provision was not narrowly tailored to meet the asserted interest. Yet, the rejected analysis was formulated by this Court and the Eighth Circuit failed to follow it. The writ should be issued to correct this error.

II.

THE COURT SHOULD ISSUE THE WRIT TO DETERMINE THE IMPORTANT FEDERAL QUESTION WHETHER ADDITIONAL INTERESTS CAN SUPPORT CAMPAIGN FINANCE REFORM.

The Eighth Circuit held that only the interest in preventing corruption or its appearance stemming from large campaign contributions justifies the campaign finance reforms at issue. The Commission asserted additional interests in support of its case. Each interest is important enough, indeed compelling if such weight is required, to support the measures.

1. PROTECTING THE EQUAL PROTECTION RIGHTS OF VOTERS AND CANDIDATES

The State's interest in protecting the Equal Protection rights of voters and candidates justifies contribution limits. The process of raising money for campaigns is an "integral part . . . of the elective process that determines who shall rule and govern" that must be open to all. *Terry v. Adams*, 345 U.S. 461, 469 (1953). The public election process "is an exclusively public function." *Flagg Brothers v. Brooks*, 436 U.S. 149, 158 (1978). It is "part of the machinery for choosing officials" and thus "becomes subject to the Constitution's

restraints" even if it is conducted by a private association. *Terry*, 345 U.S. at 481 (Clark, J., concurring) [quoting *Smith v. Allright*, 321 U.S. 649, 664 (1944)]. Exclusion from an "integral part" of the elective process "does not merely curtail [citizens'] voting power, but abridges their right to vote itself." *Morse v. Republican Party of Virginia*, 116 S. Ct. 1186, 1200 (1996).

Simply put, a "wealth primary" precedes every election for office. Voters and candidates were denied participation in this wealth primary under the prior system. They were denied the right, guaranteed by the Fourteenth Amendment, to participate in the elective process on an equal and meaningful basis. See, *Morse, supra; Terry, supra; Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); Jamin Raskin and John Bonifaz, *Equal Protection and The Wealth Primary*, 11 Yale L. & Pol'y Rev. 273 (1993). The wealth primary disadvantages voters "in their opportunity to influence the political process effectively." *Davis v. Bandemer*, 478 U.S. 109, 133 (1986). It undermines and debases the constitutionally guaranteed value of votes, and presents a "real and appreciable impact on the exercise of the franchise." *Bullock v. Carter*, 405 U.S. 134, 144 (1972).

In *Bullock*, this Court struck down the system of filing fees required by Texas for candidates in primary elections on equal protection grounds. The Texas system created "barriers to candidate access to the primary ballot, thereby tending to limit the field of candidates from which voters might choose." *Id.* at 143. Analyzed from the point of view of voters of modest economic means, the size of these fees gave the system "a patently exclusionary character" that confronted candidates first by precluding them from "seeking the nomination of their chosen party" due to their lack

of personal wealth or access to it "no matter how qualified they might be, and no matter how enthusiastic their popular support." *Ibid.* This "exclusionary mechanism" also produced an effect on voters. With less affluent candidates excluded from running, voters were "substantially limited in their choice of candidates." *Id.* at 144. This reduction of electoral choice fell "more heavily on the less affluent segment of the community, whose favorites" could not pay the filing fees. Conversely, the exclusion of those candidates gave "the affluent power to place on the ballot their own names or the names of persons they favor." *Ibid.* It would "ignore reality," the Court held, "not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status." *Ibid.*

The system erected by Texas used one criterion, wealth or access to it, as a condition to being on the ballot. It excluded otherwise serious and qualified candidates and denied vast numbers of voters the opportunity to vote for candidates of their choice, a violation of their equal protection rights. *Id.* at 149. This Court established a basic principle of Equal Protection law: wealth, or the lack of it, may not "be used to block meaningful participation by a group of citizens in the electoral process." Raskin and Bonifaz, *supra,* at 287. The same exclusionary mechanism exists with the wealth primary.

One natural outcome of this exclusion is that these voters are disenfranchised. Their favored candidates never even reach the ballot. Rather than voting, they stay home on election day. See, Institute for Southern Studies, Press Release, New Study Names "Dismal Dozen" for Poor Voter Turnout, Poor Laws, Feb. 4, 1993.

Protecting these rights is weighty, indeed compelling. "The right to vote freely for a candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The framers of the Fourteenth Amendment condemned actions that "in any way abridged" a citizen's "right to vote" for candidates of her choice. U. S. Const., amend. 14 § 2. What state interest could be more compelling than protection of these rights so explicitly defined in this nation's laws?

In the words of the respondents in this case "contributions to political campaigns make better listeners of candidates." Heretofore, only those with the financial wherewithal to contribute large amounts of money had such access. Arkansas' law changed that landscape and created a system where all could participate in the elective process in a meaningful way and enjoy access to their elected representatives. The writ should issue so that it can be reviewed with this interest in mind.

2. PROTECTING THE FIRST AMENDMENT RIGHTS OF VOTERS AND CANDIDATES.

The Commission also has an interest in protecting the First Amendment rights of voters and potential candidates to full participation in the political marketplace of ideas. This argument calls for the Court to balance First Amendment concerns against one another. On the one hand are the interests of contributors to give financial support to campaigns. On the other are the rights of voters to hear voices in the political marketplace and of potential candidates to be heard.

Whenever a system excludes candidates from the ballot it affects the First Amendment rights of others in two ways. First, by preventing potential candidates from becoming players on the political scene, a system prevents those candidates from joining in the debate. Thus, this nation's "profound national commitment to the principle that the debate on public issues should be uninhibited, robust and wide-open . . ." is undermined. *New York Times v. Sullivan*, 376 U.S. 254, 271 (1974). The State has a compelling interest in ensuring that all voices have access to the ballot for a full airing of debate on public issues.

Second, this exclusion of candidates of marginal wealth deprives voters of their First Amendment right to receive information on public issues. This Court has recognized the importance "in fostering an informed electorate." *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 228 (1989) (citing *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 220 (1986)). Voters have the First Amendment right to hear political speech. This Court relied on this right in holding that corporations should be allowed to present opposition to a referendum. *First National Bank v. Bellotti*, 435 U.S. 765 (1978). In *Bellotti*, the Court focused on the fact that the "First Amendment protects interests broader than those of a party seeking their vindication" and includes the interests of society in learning the position of the corporation. *Id.* at 776. If candidates are excluded from the ballot because of the campaign finance scheme in place, voters are deprived of these rights. The State has a compelling interest in preventing such exclusion.

Broader limits on contributions to political campaigns do not translate into more speech. They have an exclusionary effect. The inability to access money acts as a filter to the

ballot. Those candidates without access to wealth or wealthy contributors are prevented from ever becoming candidates, regardless of their popular support. Their voices are excluded from the political marketplace of ideas and the result is less speech, not more. Once again, Arkansas' campaign finance laws merit review with this interest in mind.

3. THE PAC LIMIT ENSURES THAT AGGREGATION OF WEALTH INDICATES POPULAR SUPPORT.

The "relative availability of funds" to a political group or association "is after all a rough barometer of public support." *Federal Election Commission v. Massachusetts Citizens For Life*, 479 U.S. 238, 258 (1986). In the corporate form, however, the aggregation of wealth from the corporate treasury undermines that notion. *Ibid.* It reflects not the "power of its ideas" but the economically-motivated decisions of its investors and customers. *Ibid.* For this reason, along with the ability of corporations to aggregate vast amounts of wealth through the corporate form under which they receive various state-granted advantages, corporations may be severely limited in their ability to use corporate funds for political purposes. See, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). This Court very jealously guards the ability of political associations and committees to aggregate funds and speak in a common voice whenever that aggregation reflects "popular support for the political positions of the committee" or association. *Massachusetts Citizens for Life*, 479 U.S. at 258. Whenever this evidence of popular support is absent, protection for such committees and associations is diminished.

Limits on contributions to PACs have the same effect. Without reasonable limits, a PAC could receive large,

exorbitant contributions from very few contributors. There would be a vast accumulation of wealth that in no way reflected the "power of the ideas" of the contributors. *Ibid.* Other committees or PACs could have vast popular support from those who are only able to contribute nominal amounts. Their ideas would face the danger of being drowned out by the mere power of money over ideas.

Act I offers a narrowly-drawn compromise. A limit is placed on contributions to PACs so that whenever they accumulate vast sums of money it reflects popular support. This limit is high enough, however, to allow the aggregation of sufficient sums of money to place the ideas of the common speakers into the political marketplace of ideas. The writ should issue in order to review Arkansas' PAC limit with this interest in mind.

CONCLUSION

For the foregoing reasons, certiorari should issue to the United States Court of Appeals for the Eighth Circuit so that this Court may review and correct the decision below, and resolve whether interests other than the prevention of corruption or its appearance justify campaign finance reform.

Respectfully Submitted,

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APPENDIX A

United States Court of Appeals,
Eighth Circuit.

Ron Russell, Kent Ingram, William R. Austin, and Associated Industries of Arkansas Political Action Committee, Appellants,

v.

Troy Burris, In His Official Capacity as Chairperson of the Arkansas Ethics Commission; Rita Looney, In Her Official Capacity as a Member of the Arkansas Ethics Commission; Tom Alexander, In His Official Capacity as a Member of the Arkansas Ethics Commission; Ben Allen, In His Official Capacity as a Member of the Arkansas Ethics Commission; Jack Kearney, In His Official Capacity as a Member of the Arkansas Ethics Commission; and Citizens for Clean Government, Appellees.

American Civil Liberties Union of Arkansas, James Madison Center for Free Speech, Shrink Missouri Government PAC, and Zev David Fredman, Amici Curiae on Behalf of Appellants.

Connecticut, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Missouri, Montana, New Mexico, North Dakota, Utah, and Vermont, Amici Curiae on Behalf of Appellees.

Ron Russell, Kent Ingram, William R. Austin, and Associated Industries of Arkansas Political Action Committee, Appellees,

v.

Troy Burris, In His Official Capacity as Chairperson of the Arkansas Ethics Commission;

Rita Looney, In Her Official Capacity as a Member of the Arkansas Ethics Commission; Tom Alexander, In His Official Capacity as a Member of the Arkansas Ethics Commission; Ben Allen, In His Official Capacity as a Member of the Arkansas Ethics Commission; and Jack Kearney, In His Official Capacity as a Member of the Arkansas Ethics Commission, Appellants,

Citizens for Clean Government, Intervenor as Defendant.

James Madison Center for Free Speech, Shrink Missouri Government PAC, and Zev David Fredman, Amici Curiae on Behalf of Appellees.

Connecticut, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Missouri, Montana, New Mexico, North Dakota, Utah, and Vermont, Amici Curiae on Behalf of Appellants.

Ron Russell, Kent Ingram, William R. Austin, and Associated Industries of Arkansas Political Action Committee, Appellees,

v.

Troy Burris, In His Official Capacity as Chairperson of the Arkansas Ethics Commission; Candi Sue Russell, In Her Official Capacity as a Member of the Arkansas Ethics Commission; Marvin Delph, In His Official Capacity as a Member of the Arkansas Ethics Commission; Rita Looney, In Her Official Capacity as a Member of the Arkansas Ethics Commission; and Norton Wilson, In His Official Capacity as a Member of the Arkansas Ethics Commission, Defendants,

Citizens for Clean Government, Appellant.

James Madison Center for Free Speech, Shrink Missouri Government PAC, and Zev David Fredman, Amici Curiae on Behalf of Appellees.

Nos. 97-3922, 97-4033 and 97-4038.

Submitted April 13, 1998.

Decided June 4, 1998.

Before WOLLMAN, BEAM, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

In 1996, the people of Arkansas, by voter initiative, approved a campaign finance reform measure entitled Initiated Act I. Prior to Act I, Arkansas law limited individuals and political action committees to contributions of $1,000 per candidate during each election cycle. Act I reduced the contribution limit to $300 for the offices of governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, and commissioner of state lands, *see* Ark.Code Ann. § 7-6-203(a), § 7-6-203(b), and to $100 for all other state public offices, *see* Ark.Code Ann. § 7-6-203(a)(1), § 7-6-203(b)(1).

Act I also created a special category of political action committee (PAC), *see* Ark.Code Ann. § 7-6-201(9), § 7-6-201(10), known as a small-donor PAC. *See* Ark.Code Ann. § 7-6-201(12). Under Act I, a small-donor PAC may accept no contribution larger than $25, *see* Ark.Code Ann. § 7-6-201(12)(B), and it may contribute no more than $2,500 per election to any candidate, *see* Ark.Code Ann. § 7-6-203(d). Act I authorized as well the creation of a campaign fund-

raising entity known as an independent expenditure committee. *See* Ark.Code Ann. § 7-6-201(14). An independent expenditure committee may, like any person, make unlimited independent expenditures (that is, ones not coordinated with a candidate) to advocate the election or defeat of a clearly identified candidate for office. *See* Ark.Code Ann. § 7-6-201(13), § 7-6- 201(14). Such a committee, however, may accept no more than $500 from any person annually. *See* Ark.Code Ann. § 7-6-203(k). Finally, Act I authorized local governments to set reasonable limitations on fund-raising for campaigns for local offices. *See* Ark. Code Ann. § 7-6-224. Ron Russell, Kent Ingram, William Austin, and the Associated Industries of Arkansas Political Action Committee challenged each of these Act I provisions in the district court, as well as a pre-Act I provision limiting contributions to any one PAC to $200 annually, *see* Ark. Code Ann. § 7-6-201(9)(B).

Following a bench trial, the district court held that the contribution limits of $300 for certain statewide offices and of $100 for state judicial offices were unconstitutional because they violated the First Amendment's prohibition against limitations on the freedom of speech. *See Russell v. Burris*, 978 F.Supp. 1211, 1222, 1224, 1229 (E.D.Ark.1997). The trial court, however, upheld the $100 contribution limit as to all other offices and the $200 contribution limit to PACs. *Id.* at 1223, 1225, 1229. The trial court also held that the differential treatment for ordinary PACs and small-donor PACs did not violate the Fourteenth Amendment's equal protection clause. *Id.* at 1227, 1229. The trial court declined to reach the merits on the other two issues, finding that the plaintiffs did not have standing to contest the limit on contributions to independent expenditure committees, *Id.* at 1217, 1229, and that the provision authorizing relevant actions by local governments was not ripe for a constitutional challenge. *Id.* at 1217-18, 1229.

All parties appeal the rulings unfavorable to their litigating positions. We affirm in part and reverse in part.

I.

Standing is, of course, a threshold issue in every case before a federal court: If a plaintiff lacks standing, he or she cannot invoke the court's jurisdiction. *See Boyle v. Anderson*, 68 F.3d 1093, 1100 (8th Cir.1995), *cert. denied*, 516 U.S. 1173, 116 S.Ct. 1266, 134 L.Ed.2d 214 (1996). In order to invoke the jurisdiction of a federal court, one must meet three requirements. First, a plaintiff must have suffered an "injury in fact," and such an injury must be concrete, particularized, and either actual or imminent. *Id.* at 1100-01. Second, a would-be litigant must make out a causal connection between the alleged injury and the conduct challenged. *Id.* at 1100. Third, he or she must show that the injury is likely to be redressed by a favorable decision. *Id.*

The trial court determined that each of the plaintiffs had Article III standing as to all but one of their challenges, *see Russell*, 978 F.Supp. at 1217, and the defendants do not contest that determination here. The plaintiffs maintain, however, that the trial court erred in finding that they did not have Article III standing to challenge the provisions of Act I relating to independent expenditure committees.

The trial court found that the plaintiffs did not face a credible threat of present or future prosecution with respect to this part of their claim, and thus could show no actual or imminent "injury in fact," because none of them "could think of an independent expenditure committee to which they had contributed in the past or to which they planned to contribute." *Id.* Indeed, one plaintiff testified, "Well, in all honesty, I'd have to tell you it would take a

stretch of my imagination to figure out why I'd want to contribute anything to an independent committee." Another simply testified that he did not know if he would ever contribute to such a committee.

We are mindful that where "plaintiffs allege an intention to engage in a course of conduct arguably affected with a constitutional interest which is clearly proscribed by statute, courts have found standing to challenge the statute, even absent a specific threat of enforcement." *United Food & Commercial Workers International Union v. IBP, Inc.*, 857 F.2d 422, 428 (8th Cir.1988). But the plaintiffs have not demonstrated any such intention: They have indicated neither that they would contribute to a specific independent expenditure committee nor that, but for the limitations of Act I, they would form an independent expenditure committee. Standing may not be predicated merely upon a conjectural or hypothetical injury or, as one of the plaintiffs here would have it, upon a stretch of the imagination. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). We therefore affirm the trial court's determination that the plaintiffs lacked standing to challenge the provisions relevant to independent expenditure committees.

II.

"Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 265, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). Government attempts to limit campaign contributions, therefore, are " ' "subject to the closest scrutiny." ' " *Carver v. Nixon*, 72 F.3d 633, 636 (8th Cir.1995), *cert. denied*, 518

U.S. 1033, 116 S.Ct. 2579, 135 L.Ed.2d 1094 (1996), quoting *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*), itself quoting *NAACP v. Alabama*, 357 U.S. 449, 461, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). Under this standard, a significant interference with protected rights of political association may be sustained only when the state demonstrates a compelling interest and means closely drawn to avoid unnecessary abridgement of associational freedoms. *Carver*, 72 F.3d at 636.

Intervenor (as a defendant) Citizens for Clean Government (CCG) argues that we should apply a more lenient standard of review to the legislation in this case because Act I included not only contribution limits but also a public subsidy scheme. For this proposition, CCG relies upon the Supreme Court's ruling in *Buckley* that upheld a ban on general election campaign contributions to, and a limitation on general election campaign expenditures by, a presidential candidate who elected to receive a public subsidy. *See Buckley*, 424 U.S. at 85-109, 96 S.Ct. 612.

But the *Buckley* Court was clear that it was the optional nature of the contribution and expenditure limit scheme, not the subsidy, that rendered the scheme constitutionally permissible: "Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding." *Id.* at 57 n. 65, 96 S.Ct. 612. Similarly, we recently upheld a voluntary campaign subsidy and limitation scheme in Minnesota because the scheme "presents candidates with an additional, optional campaign funding choice, the participation in which is voluntary." *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir.1996), cert. denied, __ U.S. __, 117 S.Ct. 1820, 137 L.Ed.2d 1028 (1997). It is true that Act I provided a subsidy and limitation scheme, but unlike the schemes upheld in *Buckley* and

Rosenstiel, Act I was imposed upon all candidates: Candidates do not have the power to opt out. We therefore decline this invitation to apply a standard of scrutiny to this case that is different from the one that we adopted in *Carver*.

CCG argues for a more lenient standard of review on the basis of two recent Supreme Court decisions as well, but neither of these authorities modifies the standard of review appropriate to this case. In *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 609, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) (opinion of Breyer, J.), a case involving the application of federal campaign expenditure limits, three justices resorted to what CCG calls a weighing test, rather than strict scrutiny, to decide the case. See *id.* at 616, 618, 116 S.Ct. 2309. These justices described their approach as consistent with cases in which the Court "essentially weighed the First Amendment interest in permitting candidates (and their supporters) to spend money to advance their political views against a 'compelling' governmental interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption." *Id.* at 609, 116 S.Ct. 2309. This adjudicatory approach appears to us to be a restatement or reformulation, not a modification, of the Court's familiar strict scrutiny analysis.

We are aware that during the last term, in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364, 1370, 137 L.Ed.2d 589 (1997), the Supreme Court upheld an election regulation that barred a political party from choosing as its nominee a candidate already appearing on another party's ballot. The Court held that while regulations "imposing severe burdens on plaintiffs' rights must be narrowly tailored and [must] advance a compelling state interest," lesser burdens "trigger [a] less exacting review."

Id. We believe, however, that restrictions on individual contributions to candidates and on candidates' amassing sufficient resources to run for office are more severe than the restrictions at issue in *Timmons*. Where the regulations impose severe burdens on First Amendment rights, as here, *Timmons* reiterates the Court's position that strict scrutiny applies.

We must therefore first determine what interest can be sufficiently compelling to permit the state to restrict First Amendment freedoms. The compelling state interest identified in *Buckley* was "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Buckley*, 424 U.S. at 25, 96 S.Ct. 612. The Court reiterated this position five years later, holding that "*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a candidate." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296-97, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981) (emphasis omitted). Subsequently, the Court stated flatly that "[p]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985).

Only three years ago, we emphasized in *Carver*, 72 F.3d at 638-39, that the state may abridge political speech in the form of campaign contributions only to address the reality or perception of undue influence or corruption attributable to large contributions. We turn, then, to a con-

sideration of whether the challenged provisions can pass muster under this standard.

III.

We consider first the provisions of Act I that limited direct contributions to candidates to $300 per election for certain statewide offices, *see* Ark.Code Ann. § 7-6-203(a), § 7-6-203(b), and to $100 per election for all other state offices, *see* Ark.Code Ann. § 7-6-203(a)(1), § 7-6-203(b)(1). The defendants must prove first that there is real or perceived undue influence or corruption attributable to large political contributions in Arkansas, and then that these challenged provisions of Act I are narrowly tailored to address that reality or perception. We find that the defendants failed to carry their burden before the trial court.

We note that our review of the trial court's judgment may involve the review of some of the factual determinations that it made. The Supreme Court has instructed that, in cases involving the First Amendment, appellate courts are to make an independent examination of the whole record to ensure that their judgments do not constitute a forbidden intrusion on the right of free expression. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 285, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). But we are also mindful of Fed.R.Civ.P. 52(a), which provides that a trial court's factual findings are typically reviewed for clear error.

To reconcile these two legal propositions, we held last year that, in cases involving the First Amendment, we would review findings of noncritical facts for clear error, but would conduct an independent review of critical facts. *See Families Achieving Independence and Respect v. Nebraska Department of Social Services*, 111 F.3d 1408,

1411 (8th Cir.1997) (*en banc*). Accordingly, in the discussion that follows, we give due deference to the trial court's determination of noncritical facts, while we review independently those facts that we believe to be critical.

We begin with the observation that no defendant provided any credible evidence to the trial court of actual undue influence or corruption stemming from large contributions. We are left, then, to determine whether the defendants proved that a reasonable person could perceive, on the basis of the evidence presented at trial, that such contributions make for undue influence or spawn corruption.

CCG presented proof at trial that was intended to demonstrate specific instances in which large contributions had given rise to the appearance of undue influence or corruption. Much of this proof focused on the introduction in the Arkansas legislature of a bill that would have prohibited local governments from regulating tobacco. The bill's sponsor, State Representative James Dietz, had received as much as $2,700 in contributions the previous year from various sources related to the tobacco industry, such as the Tobacco Institute. Many other supporters of the bill had apparently also received contributions from pro-tobacco sources. An opponent of the bill, State Representative Ted Thomas, testified that there was a "uniform" public perception of corruption associated with the bill's having been introduced and supported by legislators who had received contributions from tobacco interests.

Even assuming that Mr. Thomas was correct that there was a public perception of corruption, we must determine whether that public perception was reasonable, and whether that perception of corruption derived from the magnitude of the contributions to Mr. Dietz and other

supporters of the bill. We believe, after an independent review of the facts presented to the trial court, that the defendants did not prove that the perception of corruption to which Mr. Thomas alluded was objectively reasonable. A newspaper article admitted into evidence quoted Mr. Dietz as saying that he supported the preemption measure because he believed that one "ought to have the right to say what goes on inside his building as long as it's legal." That Mr. Dietz received political contributions from those whose interests he tended to support hardly indicates, on its own, any corruption.

The defendants provided no evidence at trial, for instance, that Mr. Dietz changed his position on the tobacco bill due to an intervening contribution. Nor did the defendants provide evidence that Mr. Dietz sought to conceal his contributions from tobacco-related sources. If it were reasonable to presume corruption from the fact that a public official voted in a way that pleased his contributors, legislatures could constitutionally ban all contributions except those from the public official's opponents, a patent absurdity. That would spell the end to the political right, protected by the First Amendment, to support a candidate of one's choice.

The defendants' objections to Mr. Dietz's activities are also, we believe, essentially unrelated to the size of the individual contributions that he received. The defendants did not provide evidence, such as that produced by the government in Buckley, of multi-million-dollar contributions to Mr. Dietz. Indeed, our review of the evidence presented to the trial court indicates that Mr. Dietz reported no individual contribution larger than $1,000 from any source, tobacco-related or otherwise. We believe that $1,000 is simply not a large enough sum of money to

yield, of its own accord and without further evidence, a reasonable perception of undue influence or corruption.

The defendants essentially criticize Mr. Dietz for offering a bill favorable to interests from whom he had already accepted campaign contributions. The difficulty pointed to, then, seems to be the identity of the contributors and their subsequent interest in legislation rather than the size of their contributions. We note that even if Mr. Dietz had received twenty-seven individual contributions of $100 from various tobacco-related sources instead of a few somewhat larger contributions, the defendants could make the same criticism of his activities as they made here. We therefore conclude that the evidence that the defendants presented regarding the tobacco legislation does not permit a finding of a reasonable perception of corruption or undue influence due to large contributions.

The defendants also produced proof at trial that was related to contributions by lobbyists to State Representative Ode Maddox. In April, 1996, a group of lobbyists held a fund-raiser for Mr. Maddox at the Arkansas Poultry Federation in Little Rock. According to the trial court, at that event Mr. Maddox raised a total of more than $22,000 from various lobbyists, PACs, and corporations. Our independent review of the record shows that Mr. Maddox received no contribution in excess of $1,000 from any single source.

The record does not indicate any change in Mr. Maddox's political behavior following these donations, nor does it indicate that Mr. Maddox sought to conceal his contributions or their sources. Indeed, the defendants did not even demonstrate that Mr. Maddox voted in any particular fashion with respect to any relevant issues following the receipt of these donations. At bottom, the defendants'

complaint about Mr. Maddox's contributions is that they came from lobbyists who live outside his district and have business before his committee from time to time. But this complaint is not related to the size of the contributions made to Mr. Maddox, and thus does not satisfy the compelling state interest standard established in *Buckley* and *Carver*. We conclude, then, that the evidence that the defendants offered regarding Mr. Maddox's fund-raising practices does not permit a finding of a reasonable perception of corruption or undue influence stemming from large contributions.

The defendants also adduced proof at trial of contributions by "real estate interests" to members of the Little Rock municipal government. But, again, the defendants' declared interest in regulating these has to do with the identity of the contributor and that contributor's interests rather than with the size of individual contributions. According to records provided to the trial court, no member of the Little Rock municipal government received more than $1,000 from any so-called "real estate interest." The record does not indicate any change in any official's behavior following such contributions, nor did the defendants demonstrate that any official attempted to conceal the source of the contributions. The evidence instead shows that the "real estate interests" contributed to candidates who supported initiatives with which the contributors agreed--that is, the "real estate interests" appear to have chosen well which candidates to support.

We cannot say that this evidence is sufficient to establish that there could be a reasonable perception of corruption or undue influence due to large contributions. The defendants identify, instead, a concern that "real estate interests" gave money to officials of a municipal government, and that those officials then voted on issues relevant

to real estate. This concern, as we have said above, is not related specifically to the size of the contributions, and thus is outside the scope of the compelling state interest as defined by *Buckley* and *Carver*.

We also believe that the candidate contribution limits set forth in Act I are too low to allow meaningful participation in protected speech and association. *See Carver*, 72 F.3d at 641-42. In *Buckley*, 424 U.S. at 20- 35, 96 S.Ct. 612, the Supreme Court approved a $1,000 contribution limit as a narrowly tailored means to address the problem of large campaign contributions. As we noted in *Day v. Holahan*, 34 F.3d 1356, 1366 (8th Cir.1994), *cert. denied*, 513 U.S. 1127, 115 S.Ct. 936, 130 L.Ed.2d 881 (1995), inflation has eroded approximately 60 percent of the value of a dollar since 1976. A $1,000 contribution in 1976 would thus be worth about the same as a $2,500 contribution today. We recognize that the contribution limit upheld in Buckley does not constitute a constitutional minimum and that we may not fine-tune the contribution limits established by Act I. *See Carver*, 72 F.3d at 641. We must, however, invalidate the contribution limitations if they are different in kind from those that *Buckley* upheld. *See id.*

The provisions of Act I challenged here limited contributions to a candidate to only $100 or $300, depending upon the office. *See* Ark.Code Ann. § 7-6-203(a), § 7-6-203(b). The limits prescribed by Act I, then, are (adjusted for inflation) approximately 4 percent or 12 percent, respectively, of the limit upheld in *Buckley*. In *Day*, 34 F.3d at 1366, we concluded that a limitation of $100, or 4 percent of the inflation-adjusted limit upheld in *Buckley*, constituted a difference in kind from the limit upheld in *Buckley*. In *Carver*, 72 F.3d at 641-42, we held that contribution limitations of $100 or $300 per election cycle (2 percent or 6 percent, respectively, of the limit approved in *Buckley*)

were "dramatically lower," and thus different in kind, from the limit upheld in *Buckley*. We believe that the limitations in question here are similarly dramatically lower than, and different in kind from, the limits approved in *Buckley*, and thus are unconstitutionally low.

We note, finally, that even if there were a compelling state interest to prevent the perception of corruption or undue influence due to any of the various concerns identified here by the defendants – that is, supporting tobacco legislation, accepting contributions from those appearing before or having interests before one's legislative committee, accepting contributions from supporters outside one's district, or the like – Act I was not narrowly tailored to address them. As we have already noted, "[w]here at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *Massachusetts Citizens for Life*, 479 U.S. at 265, 107 S.Ct. 616. Act I, however, is at once both overinclusive and underinclusive, by limiting the free speech of all who would contribute without addressing the specific concerns identified.

IV.

The plaintiffs challenged two provisions relating to the activities of political action committees. The first of these was a provision, enacted in 1990, that prohibited persons from giving more than $200 each year to any one political action committee. *See* Ark.Code Ann. § 7-6-201(9)(B).

State-enforced limits on contributions to political action committees stifle "not only free political speech, but also free political association," and are reviewed according to a strict scrutiny standard. *Day*, 34 F.3d at 1365. We must

therefore determine whether the defendants demonstrated that the provision was narrowly tailored to address the compelling state interest in avoiding corruption or the appearance of corruption that stems from large contributions.

We hold that this provision, like the provision that we invalidated in *Day*, is not narrowly tailored to serve a compelling state interest, because the annual limit is so low as to be different in kind from the limit approved in *Buckley*. *See id.* at 1366. In *Day*, we noted that a $100 limit (in 1994 dollars) for contributions to political action committees was, adjusted for inflation, equal to approximately 4 percent of the contribution limit upheld in *Buckley*. *Id.* Thus, a $200 limit (in 1998 dollars) is equal to no more than 8 percent of the contribution limit approved in Buckley. That limit is also less than 5 percent, even before any adjustment for inflation, of the $5,000 limitation on contributions to PACs approved by the Supreme Court in *California Medical Association v. Federal Election Commission*, 453 U.S. 182, 195-99, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981) (plurality opinion).

There is also less of a danger of *quid pro quo* corruption, such as the sort that one might presume from large contributions given directly to candidates, when a contribution is given to a PAC that does not itself wield legislative power. *Cf. Day*, 34 F.3d at 1365. We believe that a $200 limit (in 1998 dollars) will significantly impair the ability of individuals to exercise their political rights. The limit is simply too low to allow for appropriately robust participation in protected political speech and association, and thus violates the protections for free political speech and free association that the First Amendment affords.

The plaintiffs also challenged the provision in Act I that permitted small-donor political action committees to give as much as $2,500 to a candidate (in contrast to the lower limits applicable to contributions by ordinary political action committees). *See* Ark.Code Ann. § 7-6-203(d); see also Ark.Code Ann. § 7-6-201(a), § 7-6-201(b). We believe that such differential treatment must be evaluated according to a strict scrutiny standard. "Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990).

The defendants argue that the differential treatment of ordinary and small-donor PACs is justified because of the difference in regulations as to their method of raising money. The only compelling government interest that might permit this infringement of First Amendment rights, as we have said, is preventing the reality or perception of undue influence or corruption that might arise from large contributions. As the Supreme Court has held, "To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." *Buckley*, 424 U.S. at 26, 96 S.Ct. 612. Ostensibly to alleviate this potential for corruption, Act I limited individuals and ordinary PACs to giving $300 to certain candidates and $100 to others (although we note that our holding above returns these limits to their pre-Act I limits of $1,000). *See* Ark.Code Ann. § 7-6-201(a), § 7-6-201(b). Act I allowed small-donor PACs, however, to give $2,500 to any candidate. *See* Ark.Code Ann. § 7-6-203(d). This differential treatment is said to be acceptable because small-donor PACs themselves receive that money in con-

tributions of $25 or less, *see* Ark.Code Ann. § 7-6-201(12)(B).

This explanation, however, is manifestly flawed, because it focuses on the source of the funds given to a PAC rather than on the entity from which the candidate receives the funds. Because a small-donor PAC receives small donations, it is true that it is unlikely that any one contributor to a small-donor PAC will be able to control that PAC. Act I, however, ignored the possibility that the small-donor PAC itself will seek to control a given candidate. A $2,500 contribution would be even more likely to exacerbate this difficulty than the $1,000 contribution limit applicable to most other contributors. Indeed, if any contribution is likely to give rise to a reasonable perception of undue influence or corruption, it would be one from an entity permitted to contribute two-and-a-half times the amount that most others are allowed to contribute. The small-donor PAC provision is not, then, narrowly tailored to serve the compelling government interest of combating the reality or perception of undue influence or corruption.

We reject the defendants' argument that the plaintiffs (namely, three individuals and a political action committee) may not assert this equal protection argument because they are not burdened to a greater extent by this provision than small-donor PACs are. Ordinary PACs may, it is true, raise more money per contribution than a small-donor PAC, but the issue is their ability to speak freely by contributing money to candidates for office. Insofar as that freedom is at issue, the ordinary PACs are burdened more than the small-donor PACs, because ordinary PACs may donate only the amount that individuals may donate, while small-donor PACs may donate $2,500. We believe, then, that the plaintiffs here meet the requirements set forth in *California*

Medical Association, 453 U.S. at 200, 101 S.Ct. 2712.

V.

The plaintiffs also challenged the constitutionality of Ark.Code Ann. § 7-6-224. This provision states only that local governments "shall have the authority to establish reasonable limitations" on campaign contributions and expenditures, and appears to be simply an allocation by the state of Arkansas of certain of its plenary powers to local governments: It does not set any specific limits on campaign contributions or expenditures, and thus cannot restrict the First Amendment freedoms of any person or entity seeking to contribute to or spend the revenues of a political campaign. Were a local government to exercise the power granted it by § 7-6-224, its action might then be challenged in the same manner as the actions of the defendants were challenged in this suit. But no such action has yet been taken and brought to the attention of a court. Ark.Code Ann. § 7-6-224 thus does not present a federal constitutional controversy that is ripe for adjudication at this time.

VI.

Those provisions of the Arkansas statutes in conflict with our analysis above are unconstitutional and unenforceable. We must now determine whether the invalid provisions of Act I may be severed from the remainder of its provisions.

Severability is a matter of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996) (*per curiam*). The Supreme Court of Arkansas looks to two considerations to determine severability: "(1) whether a

single purpose is meant to be accomplished by the act; and (2) whether the sections of the act are interrelated and dependent upon each other." *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W.2d 349, 357 (1994). The court provided further guidance, moreover, in its observation that "it is important whether the portion of the act remaining is complete in itself and capable of being executed wholly independent of that which was rejected." *Id.* at 358. A severability clause, such as the one provided in Act I, is relevant but not determinative of whether individual provisions of the act will be considered severable. *Id.*

Applying the principles set forth in *U.S. Term Limits*, we find no single purpose behind Act I with which our ruling could interfere. Act I provided for a series of campaign finance reforms, including the independent expenditure committee and certain tax provisions, that remain unaffected by the outcome of this case. We can find no reason not to honor the intent of the drafters of Act I that, to the extent possible, its various provisions should stand on their own.

VII.

We therefore affirm in part and reverse in part the judgment of the trial court. We remand the case to the district court for the entry of declaratory and injunctive relief consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

No. LR-C-97-0089.

Ron Russell, Kent Ingram, William R. Austin, and Associated Industries of Arkansas Political Action Committee,

Plaintiffs,

v.

Troy Burris, in his official capacity as chairperson of the Arkansas Ethics Commission, and Candi Sue Russell, Marvin Delph, Rita Looney, and Norton Wilson, in their official capacities as members of the Arkansas Ethics Commission,

Defendants,

and

Citizens for Clean Government,

Defendant-Intervenor.

MEMORANDUM & ORDER

The plaintiffs seek a declaratory judgment that Arkansas Initiated Act I of 1996 (Act I) violates their First Amendment rights to freedom of political speech and association,[1]

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[1]First Amendment protections are made applicable to the states by the Fourteenth Amendment. See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336 n. 1, 115 S.Ct. 1511, 1514 n. 1, 131 L.Ed.2d 426 (1995).

and their Fourteenth Amendment right of equal protection of the laws. They seek to enjoin the enforcement of both Act I and Arkansas Code 7-6-201(9)(B), a law that pre-dated Act I. The plaintiffs' motion is granted in part and denied in part:

A. Enforcement of Arkansas Code section 7-6-203(a)(2) and (b)(2), which imposes a $300 per election contribution limit applicable to enumerated statewide offices, is enjoined.

B. Arkansas Code section 7-6-203(a)(1) and (b)(1), which imposes a $100 per election contribution limit applicable to all other offices, is upheld, except as to the offices of Supreme Court Justice and Court of Appeals Judge. Application of this section to the offices of Supreme Court Justice and Court of Appeals Judge, is enjoined.

C. Arkansas Code section 7-6-201(9)(B), which imposes a $200 per year limit on contributions to approved political action committees, is upheld.

D. Arkansas Code sections 7-6-201 and -203(d), pertaining to small donor political action committees, are upheld against the plaintiffs' challenge on equal protection grounds.

E. The plaintiffs lack standing to challenge Arkansas Code sections 7-6- 201(13) and (14), and 7-6-203(k), which address contributions to an independent expenditure committee.

F. The plaintiffs' challenge to Arkansas Code section 7-6-224, concerning the authority of local jurisdictions to

enact more restrictive campaign contribution regulations than state law, is dismissed because it is not ripe.

I. Background

A. Act I

Act I, which amended Arkansas' existing campaign contribution laws, was approved by voters on November 5, 1996, by a two-to-one margin. Before Act I, a candidate could receive up to $1000 in contributions per election from individuals, corporations, unions, political action committees (PACs) and other groups. Ark.Code Ann. 7-6-201(1), -203(a) (Michie Supp.1995). In addition, a state political party could contribute up to $2500 per election to that party's candidate. *Id.* 7-6-203(d). Since 1990, approved PACs have been limited to contributions of no more than $200 per year from any person. *Id.* 7-6-201(9). While not established by Act I, this limitation is attacked by the plaintiffs in this action.

Act I made substantial changes to Arkansas' campaign contribution law. Under the Act I amendments, candidates for the offices of Governor, Lieutenant Governor, Secretary of State, State Treasurer, State Auditor, Attorney General, and Commissioner of State Lands ("statewide candidates") may not accept campaign contributions exceeding $300 per election from any person.[2] Candidates for all other offices,

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[2]Section 2 of Act I states in part:

Arkansas Code 7-6-203(a) [and] (b) . . . are hereby amended to read as follows:

. . . . .

(a)(2) It shall be unlawful for any candidate for the office of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor

including Arkansas Supreme Court Justices and Court of Appeals Judges, are limited to contributions of no more than $100 per election from any person.[3] Although state Supreme Court Justices run statewide, they are not included in the category of "statewide candidates" under the Act I limitations. Arkansas Court of Appeals Judges are elected from districts of approximately 400,000 persons. By way of comparison, Arkansas Senate districts include approximately 68,000 persons; Arkansas House of Representatives districts include a population of approximately 24,000.

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of State, Attorney General, and Commissioner of State Lands, or for any person acting on the candidate's behalf, to accept campaign contributions in excess of three hundred dollars ($300) per election from any person.

. . . . .

(b)(2) It shall be unlawful for any person to make a contribution to a candidate for the office of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, or to any person acting on the candidate's behalf, which, in the aggregate, exceeds three hundred dollars ($300) per election.

[3]Section 2 of Act I provides in part:

Arkansas Code 7-6-203(a) [and] (b) . . . are hereby amended to read as follows:

(a)(1) It shall be unlawful for any candidate for any public office, except the office of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, or for any person acting on the candidate's behalf, to accept campaign contributions in excess of one hundred dollars ($100) per election from any person.

. . . . .

(b)(1) It shall be unlawful for any person to make a contribution to a candidate for any public office, except the office of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, or to any person acting on the candidate's behalf, which, in the aggregate, exceeds one hundred dollars ($100) per election.

. . . . .

Act I did not disturb the right of political parties to contribute up to $2500 to a candidate per election,[4] and it creates a small donor PAC subject to the same $2500 limit.[5] Neither did the Act alter the definition of "persons," which remains: "any individual, proprietorship, firm, partnership, joint venture, syndicate, labor union, business trust, company, corporation, association, committee, or any other organization or group of persons acting in concert. It shall also include organized political parties. . . ." *Id.* § 7-6-201(1). Because approved PACs are persons by definition, Act I limits their contributions to statewide candidates to $300 per election and contributions to other candidates to $100 per election. Act I also limits aggregate contributions by any person to independent expenditure committees[6] to $500 per

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[4]Section 2 of Act I requires in part:

Arkansas Code 7-6-203 . . . (d) [is] hereby amended to read as follows:

(d) However, an organized political party as defined in Arkansas Code 7-1-101(1) and a small donor political action committee may contribute up to two thousand five hundred dollars ($2500) to each candidate per election.

[5]Section 1 of Act I requires in part:

Arkansas Code 7-6-201 is hereby amended to add the following new subdivision[ ]:

(12) A "small donor political action committee" means any person who: (A) Receives contributions from one or more individuals in order to make contributions to candidates; (B) Does not accept any contribution or cumulative contributions in excess of twenty-five dollars ($25) from any individual in any calendar year; and (C) Is registered pursuant to Arkansas Code 7-6-215 prior to making contributions to candidates. "Small donor political action committee" shall not include an organized political party, the candidate's own committee, or an exploratory committee.

[6]Section 1 of Act I provides in part:

Arkansas Code 7-6-201 is hereby amended to add the following new subdivisions:

. . . . .

(13) An independent expenditure is any expenditure which is not a

calendar year.[7] Introducing a public subsidy element, Act I provides for state tax credits for campaign contributions of $50 per year on an individual return and $100 on a joint return.[8] Additionally, Act I allows municipalities, counties

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contribution and: (A) expressly advocates the election or defeat of a clearly identified candidate for office; and (B) is made without arrangement, cooperation, or consultation between any candidate, or any authorized committee or agent of such candidate, and the person making the expenditure or any authorized agent of that person; and (C) is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of the candidate.

(14) "Independent expenditure committee" means any person who receives contributions from one or more persons in order to make an independent expenditure and is registered pursuant to Arkansas Code 7-6-215 prior to making expenditures.

[7]Section 3 of Act I declares:

Arkansas Code 7-6-203 is hereby amended to add the following new subsection:

(k) An independent expenditure committee may not accept any contribution or cumulative contributions in excess of five hundred dollars ($500) in value from any person in any calendar year.

[8]Section 10 of Act I provides the following:

Arkansas Code Title 7, Chapter 6, Subchapter 2 is amended by adding the following new section: 7-6-222. Tax Credits for Certain Individual Political Contributions.

(a) Pursuant to regulations to be adopted by the Arkansas Department of Finance and Administration, a single credit against individual Arkansas income taxes shall be allowed for money contributions made by the taxpayer in a taxable year to one or more of the following:

(1) A candidate seeking nomination or election to a public office at an election, or to the candidate's campaign committee; or

(2) A small donor political action committee as defined in Arkansas Code 7-6-201; or

(3) An approved political action committee as defined in Arkansas Code 7-6-201; or

(4) An organized political party as defined in Arkansas Code 7-1-101(1).

and townships to set contribution limits lower than those set by state law.[9]

B. The Parties

The plaintiffs are three individuals and a registered Arkansas PAC. Plaintiff Kent Ingram is a businessman, former state senator, and frequent campaign contributor, who had made numerous campaign contributions at levels that would exceed the Act I limits, and who desires to continue to contribute at the higher levels. Plaintiff William R. Austin is a businessman who wishes to contribute in amounts exceeding the Act I limits. Plaintiff Ron Russell is the Executive Vice-President of the Arkansas Chamber of Commerce, a former mayor, and campaign contributor in amounts that would exceed current Act I limits. Mr. Russell also wishes to contribute at the higher levels. Plaintiff Associated Industries of Arkansas Political Action Committee (AIAPAC) is an approved PAC favoring business interests, that asserts the right to contribute $2500 per election to candidates, just as a small donor PAC may do. Plaintiffs

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(b) The credit allowed by subsection (a) of this section shall be the aggregate contribtions, not to exceed fifty dollars ($50) on an individual tax return, or the aggregate contributions, not to exceed one hundred dollars ($100) on a joint return.

[9]Section 12 of Act I provides:

Arkansas Code Title 7, Chapter 6, Subchapter 2 is amended by adding the following new section:

7-6-224. Authority of Local Jurisdictions

Municipalities, counties and townships shall have the authority to establish: reasonable limitations on the time periods candidates for local office shall be allowed to solicit contributions; limits on contributions to local candidates at amounts lower than those set by state law; and voluntary campaign expenditure limits for candidates seeking election to their respective governing bodies.

Ingram and Russell are officers of the State Chamber PAC. Plaintiffs Austin and Russell are officers of AIAPAC.

The defendants are the individual members of the Arkansas Ethics Commission, sued in their official capacities. The Commission administers Arkansas campaign finance and disclosure laws and investigates alleged violations of these laws. Defendant-Intervenor Citizens for Clean Government (Citizens), is a coalition of organizations including the Association of Community Organizations for Reform Now (ACORN), Common Cause, the New Party, and a local union. Citizens was the principal proponent of Act I.

C. The Issues

The plaintiffs claim that the following provisions of Act I violate their rights to freedom of political expression (speech) and association under the First Amendment: (1) the $100 and $300 limits on campaign contributions to candidates; (2) Act I's authorization for local jurisdictions to set even lower contribution limits; and (3) the $500 limit to annual contributions a person may give to an independent expenditure committee. The plaintiffs challenge, on the same grounds, Arkansas' $200 per person limit on annual contributions to an approved PAC. As noted earlier, this latter limit was approved by a ballot initiative in 1990, and thus pre-dated Act I. The plaintiffs claim further that in allowing small donor PACs to contribute $2500 per election to a candidate, Arkansas denies equal protection of the laws to approved PACs, which are subject to the $100 and $300 individual contribution limits. The defendants and Citizens argue that plaintiffs lack standing to assert these claims.

II. Discussion

A. Standing

This Court's jurisdiction is restricted by the U.S. Constitution, which allows federal courts to hear only "cases" and "controversies." U.S. Const. art. III, 2, cl. 1. The Court cannot render advisory opinions. Whether a plaintiff has standing to invoke the jurisdiction of the federal courts is a threshold question in any case. To establish standing a plaintiff must show: (1) that she suffered an injury in fact--"an invasion of a legally protected interest" that is both "concrete and particularized," and "actual or imminent, not 'conjectural' or 'hypothetical' "; (2) a causal connection between the injury and the challenged action; and (3) that a favorable decision is likely to redress her injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (citations omitted). When a party brings "a pre-enforcement challenge to a statute that both provides for criminal penalties and abridges First Amendment rights, 'a credible threat of present or future prosecution itself works an injury that is sufficient to confer standing.' " *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129, 131 (8th Cir.1997) (quoting *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir.1996)). The Honorable H. Franklin Waters discusses this precise issue in a case challenging the constitutionality of Act I. *Arkansas Right to Life State Political Action Comm. v. Butler*, 972 F.Supp. 1187 (W.D.Ark.1997).

In *Arkansas Right to Life*, the defendants argued that the plaintiffs lacked standing to raise a claim against Defendant Butler, a State Attorney for Benton County, Arkansas. The defendants contended that there was no real and immediate threat that Butler would prosecute the plaintiffs, because

prosecutors had not brought criminal charges for violations of state contribution limits since the limits were enacted in 1975. The court rejected this reasoning, concluding instead that this time span was not sufficient to show that failure to prosecute under the Act was a "deeply embedded way that Arkansas carries out state policy. The fact that Arkansas has recently chosen to address the issue through passage of the Act provides ample grounds for believing that a credible threat of prosecution exists under the Act." *Id.* at 1192. Finding that the defendants had failed to introduce compelling evidence that the plaintiffs did not face a credible threat of prosecution, Judge Waters concluded. "the Act has been recently enacted, it facially restricts the plaintiffs, and violation of the statute can subject the plaintiffs to criminal prosecution." *Id.* at 1192.

Here, the plaintiffs testified that they want to contribute more to candidates, PACs, and independent expenditure committees than is allowed by the limits established by Arkansas law as amended by Act I. The defendants and Citizens counter that these assertions are largely speculative and unsupported by the facts. I find that the Act I amendments present a credible threat of present or future prosecution with respect to each of the plaintiffs' claims. *Arkansas Right to Life*, 972 F.Supp. at 1192. Therefore, the Plaintiffs have standing, except in their challenge to the $500 limit to annual contributions a person may give to an independent expenditure committee. This exception arises because none of the plaintiffs could think of an independent expenditure committee to which they had contributed in the past or to which they planned to contribute, although they stated they may wish someday to contribute to such a committee. The plaintiffs' stated desire to contribute to independent expenditure committees is too conjectural to support a finding of

a credible threat of present or future prosecution. Therefore, on this issue, I find that the plaintiffs lack standing.

B. Ripeness

One other claim fails to meet a threshold requirement. The plaintiffs allege a violation of their First Amendment rights because Act I authorizes local jurisdictions to set even lower contribution limits than the state imposes. This issue is not ripe for consideration, because no local jurisdiction has yet set a lower contribution level. I can "only hypothesize that such an event will come to pass, and it is only on this basis that the constitutional claim could be adjudicated at this time." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 304, 99 S.Ct. 2301, 2312, 60 L.Ed.2d 895 (1979). *See also Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515-16, 18 L.Ed.2d 681 (1967).

C. Limits on Contributions

1. Contributions to candidates

Any analysis of the constitutionality of limited contributions to candidates under Act I must begin with *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). In *Buckley*, the Supreme Court upheld as constitutional provisions of the Federal Election Campaign Act of 1971 (FECA) limiting campaign contributions in federal elections. The Court upheld FECA's $1000 per election contribution limit to single candidates by an individual contributor or group, and a $5000 limit to candidates by a political committee. 424 U.S. at 23-24, 35-36, 96 S.Ct. at 637, 642-43. After recognizing that the freedoms of speech and association "lie[ ] at the foundation of a free society," the Court warned that "[n]either the right to associate nor the right to participate in political activities is absolute." *Id.* at

25, 96 S.Ct. at 637-38 (citations omitted). The Court instructed that these rights may be limited if the limitation is "closely drawn to avoid unnecessary abridgment of associational freedoms" and if the state "demonstrates a sufficiently important interest." *Id.*, at 25, 96 S.Ct. at 637-38.

In a decision directly applicable here, the Eighth Circuit, only two years ago, decided the constitutionality of a Missouri initiative on campaign contribution limits. The court found the initiative's limits too low to pass constitutional muster, in spite of the fact that the initiative passed by a three-fourths majority. *Carver v. Nixon*, 72 F.3d 633 (8th Cir.1995), cert. denied, ___ U.S. ___, 116 S.Ct. 2579, 135 L.Ed.2d 1094 (1996).[10] This Missouri law limited campaign contributions by a person or committee to a candidate or candidate committee to: (1) $100 for candidates in districts with populations of less than 100,000; (2) $200 for non-statewide candidates in districts with a population of 100,000 or more; and (3) $300 for statewide candidates. *Id.* at 635. Statewide candidates were defined by the Missouri statute as Governor, Lieutenant Governor, Attorney General, Auditor, Treasurer, and Secretary of State. The Missouri limits applied to an "election cycle," defined by Missouri statute as "the period of time from general election for an office until the next general election for the same office." *Id.* at 635 & n. 3 [citing Mo.Ann.Stat. 130.100 (Vernon Supp.1995)]. An election cycle included both the primary and the general election. *Id.* Thus, a candidate for statewide office in Missouri could receive a total of $300 for both the primary and general elections. Conversely, Arkansas' limit

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[10]For a thoughtful discussion of *Carver*, see William J. Connolly, How Low Can You Go? State Campaign Contribution Limits and the First Amendment, 76 B.U.L.Rev. 483 (1996).

is $300 *per election*. In Arkansas, a candidate for one of the enumerated statewide races could receive a total of $900, assuming a primary race, a run off, and then a general election.

In *Carver*, the plaintiff argued, as the plaintiffs do here, that the contribution limits unconstitutionally infringed on his First Amendment rights to political expression and freedom of association. After noting that individual Justices of the U.S. Supreme Court had voiced differing opinions on the level of scrutiny applicable to contribution limits, the *Carver* court concluded that, "[t]he Court has not ruled that anything other than strict scrutiny applies" in cases involving such limits. *Id.* at 637.[11] The court thus applied strict

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[11]In his partial concurrence and dissent in *Buckley*, Justice White argued that while campaign contributions help produce speech, they are not themselves speech protected by the First Amendment. Justice White reasoned that "[FECA] regulates . . . giving and spending money, acts that have First Amendment significance not because they are themselves communicative with respect to the qualifications of the candidate, but because money may be used to defray the expenses of speaking or otherwise communicating about the merits or demerits of federal candidates for election." 424 U.S. at 259, 96 S.Ct. at 745. Justice White would not have decided the challenge to contribution limits on First Amendment speech grounds. Rather, he saw the issue as one depending on whether the government's nonspeech interests in regulating "the use of money in political campaigns are sufficiently urgent to justify the incidental effects" that limits have on the First Amendment rights of candidates. *Id.* at 260, 96 S.Ct. at 746. Justice White reiterated this view almost 10 years after *Buckley*:

> The First Amendment protects the right to speak, not the right to spend, and limitations on the amount of money that can be spent are not the same as restrictions on speaking. I agree with the majority that the expenditures in this case "produce" core First Amendment speech. But that is precisely the point: they produce such speech; they are not speech itself. . . . Such a house-that-Jack-built approach could

scrutiny and required the state to prove that the statute's limitations were "narrowly tailored to meet a compelling state interest." *Id.* at 638. The court emphasized that when government defends a regulation on speech it must demonstrate that the regulation will "alleviate these harms in a direct and material way." *Id.* at 644 [citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664, 114 S.Ct. 2445, 2470, 129 L.Ed.2d 497 (1994) (Kennedy, J., plurality)]. Where First Amendment freedom of association concerns are threatened, the court found that, under *Buckley*, the regulation must be "closely drawn to avoid unnecessary abridgment" of these freedoms. *Id.* at 644 (quoting *Buckley*, 424 U.S. at 25, 96 S.Ct. at 637-38).

Addressing the state's compelling interest, the Eighth Circuit declared that the *Buckley* Court "identified the compelling interest as 'the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of *large financial contributions* on candidates' positions and on their actions if elected to office.' " *Id.* at 638 (quoting *Buckley*, 424 U.S. at 25, 96 S.Ct.

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equally be used to find a First Amendment right to a job or to a minimum wage to "produce" the money to "produce" the speech. *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 508, 105 S.Ct. 1459, 1474, 84 L.Ed.2d 455 (1985) (internal citation omitted).

It has been suggested, in jest, that if "spending money in politics is really speech, then the laws against bribery should be unconstitutional." Robert Peck, et al., Constitutional Implications of Campaign Finance Reform, 8 Admin.L.J.Am.U. 161, 186 (1994) (comments of Professor Jamin B. Raskin). I think the point is that limiting campaign contributions should not be equated with limiting protected speech. If I were writing on a clean slate, I might well be persuaded that Justice White's view is correct; but his opinion has remained a minority view.

at 638) (emphasis in original).[12] The Eighth Circuit concluded that the district court, which had upheld the Missouri statute as constitutional, had erred in extending *Buckley* to *limit all* contributions, not just large ones. *Id.* at 639. In other words, under the explicit holding in *Carver*, if $1000 is not large, the analysis ends and the plaintiffs win. This leaves me the difficult task of determining what a "large" contribution is in the context of Arkansas elections.

The *Carver* court concluded that the district court had posed, but had not answered, the question of whether the Missouri limits were unconstitutionally low. *Id.* at 640. The court noted that the district court's conclusions extended only to the question of whether the limits were narrowly tailored. *Id.* ("The fact that [the Missouri initiative] sets forth graduated limits has nothing to do with whether the limits are so low as to be unconstitutional.") Turning once more to *Buckley*, the court observed that, "[a]lthough we certainly are not free to fine tune the limits established by [the Missouri statutes], and we generally accept the limits established by the legislature, *Buckley* instructs that we must invalidate that judgment when the 'distinctions in degree' become 'differences in kind.' " *Id.* at 641 (quoting *Buckley*, 424 U.S. at 30, 96 S.Ct. at 640). After independently reviewing the facts, the Eighth Circuit held that the contribution limitations did, in fact, amount to a "difference in kind" compared to the $1000 limits upheld in *Buckley*. *Id.* at 645. At first blush, it might appear that *Carver* requires an out-of-hand ruling for the plaintiffs. However, I believe that a close in-

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[12]This portion of *Buckley* quoted in *Carver* is actually the Supreme Court's characterization of the parties' definition of the state interest, and was not an explicit holding of the Supreme Court.

spection reveals constitutionally important differences between the *Carver* case and the claims in this case.

As noted, the *Carver* court held that the state's compelling interest in burdening political activity protected by the First Amendment was that of limiting "the reality or perception of undue influence and corruption from large contributions." *Id.* at 639. Prior to the passage of the law challenged in *Carver*, Missouri had no contribution limits. The court noted two extreme examples of corruption presented at trial: a $420,000 contribution from a corporation's PAC to various local races, and the "Keating Five" scandal. *Id.* at 642. In finding that the Missouri law was not narrowly-tailored to avoid corruption, the court declared that "[a] $420,000 contribution is a far cry from the [Missouri] limits." *Id.* In contrast, Arkansas has limited individual contributions to $1000 since 1975,[13] and there was no evidence at trial of campaign contributions exceeding $1000. I believe that the contribution limits in place prior to Act I were intended to address Arkansas' interest in limiting real or perceived undue influence or corruption from extremely "large" contributions, such as the $420,000 contribution mentioned by the Eighth Circuit in *Carver*, and the $2 million contribution to the 1972 Presidential campaign from dairy interests referred to in *Buckley*. 424 U.S. at 27 n. 28, 96 S.Ct. at 638 n. 28 [citing the D.C. Circuit's discussion of contribution abuses in the same case, *Buckley v. Valeo*, 519 F.2d 821, 840 n. 36 (D.C.Cir. 1975) (per curiam)]. However, I conclude that Arkansas, having initially established contribution

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[13]The Arkansas Legislature first established a $1000 per election contribution limit in 1975, which it increased to $1500 per election in 1981. In 1990, the voters passed Initiative Measure No. 1, returning the limit to $1000. Ark. Code Ann. § 7-6-203 (historical notes).

limits intended to avoid corruption associated with large contributions, may subsequently lower the level of such limits, if the limits have not adequately addressed that harm, and the lower limits are not so low as to render them a difference in kind rather than a difference in degree. So, what is "large," and what is "too low"? "Ay, there's the rub."[14]

I find that, at least regarding the non-statewide offices, the defendants and Citizens have shown that Arkansas' campaign contribution laws prior to Act I have not adequately addressed the harm of real or perceived undue influence or corruption arising from large contributions. For example, the defendants and Citizens introduced evidence of an April 1996 fundraiser organized by registered business interest lobbyists for Representative Ode Maddox, the Chairman of the Arkansas General Assembly's House Insurance and Commerce Committee. The event was held at the Arkansas Poultry Federation office in Little Rock. Representative Maddox's district is in the Ouachita Mountains in the western part of the state. None of the contributors resided in Representative Maddox's district, and most if not all of these contributors had lobbied before members of the Insurance and Commerce Committee. Significantly, of the more than $30,000 Representative Maddox raised for his campaign, over $22,000 came from various lobbyists, business related PACs, and corporations, including several contributions of $1000.

I hasten to point out that no evidence of actual undue influence was introduced, and the defendants and Citizens did not contend there was any such evidence. Repre-

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[14] William Shakespeare, Hamlet, act 3, sc. 1, l. 56.

sentative Maddox's uncontradicted testimony was that he had never solicited "a dime" in contributions in any race during his more than forty years of service in the Arkansas General Assembly. Furthermore, Representative Maddox testified that he gave all interested parties an equal opportunity to be heard before his committee, regardless of contributions. I credit this testimony. Nonetheless, the question of appearances remains.

Defendants and Citizens introduced evidence concerning the sponsoring of a "tobacco bill" sponsored by State Representative James Dietz. This bill, if enacted, would have kept local governments from passing ordinances regulating tobacco, leaving all such regulation to the state. The evidence reflected that Representative Dietz received contributions totaling $2700 from tobacco interests in one election cycle. The evidence also revealed that tobacco interests had made several contributions to the members of the House Committee who voted for the bill. While Representative Dietz publicly defended this bill on the merits (according to a newspaper article introduced into evidence), it received widespread media attention, and was roundly condemned as "bad," "special interest" legislation. It would be hard to argue that the media, and presumably, therefore, the public, did not in this instance perceive undue influence from "large" contributions.

Citizens also introduced an August 1997 report compiled by ACORN of the 1994 election cycle for the Arkansas House and Senate races. The report examined contributions in excess of $100, and found that special interest group contributions made up seventy percent of the total. After subtracting contributions from non-business related interest groups, the report noted that business related interest groups still accounted for between sixty-two and sixty-five

percent of contributions in excess of $100. Defendants' witness Robert Stern testified concerning a study conducted by the Center for Governmental Studies that listed campaign contribution patterns over the past three election cycles in Arkansas. Mr. Stern's testimony echoed the findings of the ACORN report. He explained that business interest contributions had provided the major part of campaign contributions.

The evidence presented here convinces me that a "large" contribution depends – at least in part – on its size relative to total campaign expenses. The Supreme Court has instructed that the compelling interest at issue "relates to the perception of undue influence of large contributions to a candidate: '[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative government is undermined. . . .' " *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 297, 102 S.Ct. 434, 437-38, 70 L.Ed.2d 492 (1981) (citations and quotations omitted). I take this to mean that a contribution large enough to support at least the appearance of a political quid pro quo is "large." This interpretation is, of necessity, fact-specific. The record here, unlike the meager record available to the court in *Carver* makes such a determination possible.

In the case of Representative Maddox, for example, approximately seventy percent of his campaign funds came from business interests in individual contributions ranging between $200 and $1000. Assuming Representative Maddox spent everything he raised, a single $1000 contribution accounted for more than three percent of his total expenses. It is both the large size of these contributions relative to Representative Maddox's total campaign expenditures and

the nature of the contributors that could give rise to a reasonable perception of undue influence. Similarly, of his total campaign expenses, Representative Dietz raised roughly twenty percent from tobacco interests, which contributed in amounts between $200 and $1000. Considered in the light of Representative Dietz's subsequent support for the tobacco bill, these contributions are large enough to support a reasonable perception of undue influence.

According to Mr. Stern's study, in the general election races for the Arkansas State Senate in 1992, 1994, and 1996, candidates raised an average of $22,500 including the candidates' own money and loans. During the same election years, candidates for the Arkansas House of Representatives raised, on average, $7550, also including personal contributions and loans. Of these averages, a single $1000 contribution equates to over four percent in the Senate races, and over thirteen percent in the House races. Clearly, a single $1000 contribution in these elections is significant. Therefore, I find that, for these non-statewide races, a $1000 contribution is sufficiently large to support a reasonable perception of undue influence.

In contrast, in Arkansas' 1994 gubernatorial general election, each candidate spent over $900,000. Of this total, $1000 is only about one-tenth of one percent. I conclude that under these facts, a $1000 contribution in a statewide race is not large enough to readily support a reasonable[15] perception of undue influence. This conclusion finds support in the fact that the *Buckley* Court did not consider a

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[15]I use the word "reasonable" because I assume that any contribution would cause some supersensitive souls to perceive undue influence.

$1000 contribution to be large. The FECA contribution limits considered in *Buckley* applied to races for both houses of Congress as well as the Presidential race. Of course, U.S. Senators are elected in each state on a statewide basis, and U.S. Representatives on a district basis. As of the 1990 census, Arkansas has four congressional districts, each with a population of roughly 590,000. While *Buckley* did not hold that $1000 is a "constitutional minimum," it seems clear that a $1000 contribution in 1997 dollars is not "large" in a statewide race when it was not large in 1976 dollars (when *Buckley* was decided), or in 1971 dollars (when FECA was enacted).[16]

Having decided that a $1000 contribution is not large for statewide races in Arkansas, I find that the State lacks the compelling interest necessary to justify further limiting contributions in the "statewide races," as well as elections for the offices of state Supreme Court Justices and Judges of the Court of Appeals.

But what of non-statewide races? Because I have concluded that a $1000 contribution to candidates for non-statewide races in Arkansas is large, I must consider whether the $100 limit imposed by Act I is too small to be constitutional. In *Buckley*, the Supreme Court observed that the FECA limits were not structured to take into account the widely ranging financial needs of the congressional and presidential campaigns. The Court declared, " '[i]f it is

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[16]The Eighth Circuit, in *Day v. Holahan*, 34 F.3d 1356, 1366 (8th Cir. 1994) noted that a $100 contribution in 1976 dollars was worth $40.60 in 1994. Dr. Herbert Alexander, a witness for the plaintiffs, testified that a $1000 contribution when FECA went into effect (1971) would be worth from $300 to $325 in 1997.

satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000.' Such distinctions in degree become significant only when they can be said to amount to differences in kind." *Buckley*, 424 U.S. at 30, 96 S.Ct. at 640 (quoting *Buckley v. Valeo*, 519 F.2d at 842).

As noted, the *Carver* court found the Missouri contribution limits to be a difference in kind compared to the FECA limits considered in *Buckley*. *Carver*, 72 F.3d at 644. In its degree-versus-kind analysis, the *Carver* court emphasized: (1) the Missouri limits were per election cycle as opposed to per election in *Buckley*; (2) after adjusting for inflation, the Missouri limits were an even smaller fraction of the FECA limits upheld in *Buckley* than the bare numbers would indicate; (3) the state's evidence concerning corrupting contributions involved amounts in the hundreds of thousands of dollars, whereas the contribution limits imposed by the challenged statute ranged only from $100 to $300 dollars; (4) the state adduced no evidence that the particular limits chosen were narrowly tailored to address corruption or the appearance of corruption associated with large campaign contributions; and (5) a much higher percentage of contributors would be affected by the Missouri limits than were affected by the FECA limits at issue in *Buckley*. *Carver*, 72 F.3d at 641-44.

In deciding whether the $100 limit represents a difference in kind, I begin by addressing the factors upon which the Eighth Circuit relied in *Carver*. First, Act I's contribution limits apply on a per election basis. This means that the Act's limits apply anew in each election within an election cycle – primary, general election, and any run-off. In contrast, the Missouri law applied to the election cycle as a single unit.

Second, the *Carver* court discussed the erosive effects of inflation in comparing FECA limits at issue in *Buckley* to the Missouri limits. This discussion applies here as well. In 1976 dollars, Act I's $100 limit shrinks to less than forty percent of its face value, and only four percent of the federal $1000 limit upheld in *Buckley*. See *Carver*, 72 F.3d at 641 [citing *Day v. Holahan*, 34 F.3d 1356, 1366 (8th Cir.1994)].

Third, in contrast to *Carver*, where state contribution limits were imposed for the first time, here the perceived undue influence argued by the defendants and Citizens occurred in spite of the $1000 limit already established by Arkansas. As to statewide races, a $1000 contribution is not large, and Act I's $300 limit is unconstitutionally low. However, as to non-statewide races, I do find a $1000 contribution to be "large." The defendants' argument that the $100 limit has been narrowly tailored is convincing, particularly in light of *Carver*. I see this as a close call.

Fourth, in contrast to the *Carver* case, the defendants and Citizens introduced substantial evidence of the need for the reduced limits found in Act I. For example, the Stern study, as well as reports compiled by ACORN, indicate that large contributions, as defined by this Court, have led to the perception of undue influence in non-statewide races.

Fifth, in *Carver*, the Eighth Circuit noted that a sizable percentage of contributors would be affected by the new limits. An even higher percentage of contributors will apparently be affected by the Act I limits here. Mr. Stern's study indicates that the $100 limit will affect as much as eighty percent of contributions in Arkansas Senate and House races.

I find persuasive the Citizens' argument that contribution limits amount to a difference in kind, when compared

to the limits upheld in *Buckley*, because the limits do not permit the same quality of political expression and association that the FECA limits allowed. In upholding FECA's $1000 contribution limit, the *Buckley* Court concluded that the limit:

> focuses precisely on the problem of large campaign contributions the narrow aspect of political association where the actuality and potential for corruption have been identified while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.
>
> Significantly, [FECA's] contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.

424 U.S. at 28-29, 96 S.Ct. at 639-40. *See also id.* at 21, 96 S.Ct. at 636 ("contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy"). Thus for Act I's limits to impermissibly affect First Amendment rights, the limits must "undermine to [a] material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties." *Id.* at 29, 96 S.Ct. at 639-40.

I conclude that Act I's $100 contribution limits applicable to candidates in non-statewide races (excepting

races for the offices of Arkansas Supreme Court Justice, and Arkansas Court of Appeals Judge) do not burden the potential for effective political dialogue to the extent that the limits can be said to represent a difference in kind. Applied in this case, the factors on which the *Carver* court relied do not alone provide a clear answer as to the degree-versus-kind question. However, this Court has had the benefit of evidence presented during a seven-day trial, including evidence derived from special elections conducted under the Act I limits.

The defendants and Citizens introduced evidence showing that the cost of running Arkansas House of Representatives and Senate races in the past three election cycles averaged between $7000 and $16,000 per election for the Arkansas House and between $23,000 and $39,000 per election for an Arkansas Senate seat. If a candidate for each of these positions raised all of her funds from $50 contributions (half of the Act I limit), a House candidate would need 320 contributors, and a Senate candidate would need 780 contributors to meet the highest of these historical cost levels. This hypothetical does not include contributions from political parties, small donor PACs, or candidates' personal contributions. Evidence admitted at trial showed that the population of an Arkansas House district is roughly 24,000 and that of a senate district is approximately 68,000. Thus I find credible the testimony of state legislators, including former Arkansas Representative Mark Pryor and Arkansas Senator Phil Wyrick (also a former Representative), that they will be able to raise adequate funds to run effective campaigns.[17] I consider it significant that no officeholder

[17]As a candidate for State Representative in two successful races prior to Act I, Mr. Pryor testified he raised sufficient funds to run effective campaigns under a self-imposed contribution limit of $250. Mr. Pryor

testified that she would be unable to run an effective campaign with the $100 limit, although two professional fundraisers did so testify. In the two special elections held in January 1997 under Act I, the evidence shows that the candidates were able to raise contributions exceeding the average amount raised by open-seat candidates in primary elections during the past three election cycles. Senator Wyrick, for example, testified that he raised approximately $24,000 for his successful Arkansas Senate race under the Act I limits, while his opponent raised about $40,000.

There are two exceptions to the finding that the $100 limit is constitutional. Act I omits from its definition of statewide offices the office of state Supreme Court Justice, even though these judges are elected in statewide races. Act I sets a $100 per election limit on the twelve judges of the Court of Appeals, who are elected from districts of equal populations.[18] In Arkansas, judicial candidates and judicial races are subject to more stringent restrictions in solicitation than other candidates. Under Canon 5C(2) of the Arkansas Code of Judicial Conduct, a judge or candidate for judicial office subject to a public election may neither personally solicit nor accept campaign contributions. Canon 5C(2) also restricts candidate committees acting on behalf of judges or candidates from soliciting earlier than 180 days prior to a primary election, or later than forty-five days after the last contested election in which the candidate participates.

The defendant's witness, Mr. Stern, testified that the $100 limit on contributions to Arkansas Supreme Court Justices was the most troubling aspect of Act I, although he

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[18]Ark. Code Ann. § 16-12-101. Prior to July 1, 1995, the Arkansas Court of Appeals was composed of six members. After that date, the membership was increased to twelve. *Id.*

suggested that this requirement was justifiable. I am also troubled by the limit, and do not think it justifiable. Several witnesses explained that a candidate is typically her own best fundraiser. Yet a judge cannot personally solicit funds. A Supreme Court Justice must nevertheless mount a statewide campaign, and Court of Appeals Judges must run in districts much larger than state senate districts.[19] I conclude that this combination of obstacles prevents candidates for these judicial positions from "amassing the resources necessary for effective advocacy." Therefore, I find that Act I's $100 limit, as applied to Arkansas Supreme Court Justices and Arkansas Court of Appeals Judges, amounts to a difference in degree when compared to those upheld in *Buckley*. It is, thus, unconstitutionally low.

2. Contributions to PACs

The plaintiffs also complain that the $200 limitation on contributions to approved PACs is so low that it unconstitutionally infringes on their First and Fourteenth Amendment rights to free speech and association. Each party cites *California Medical Ass'n v. FEC*, 453 U.S. 182, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981) as controlling on this issue. In *California Medical*, a federal PAC complained of FECA's $5000 per year limit on contributions to multicandidate federal PACs. Upholding the challenged provision of FECA, a plurality of the Court concluded that the limitations on contributions to PACs was justified by the government's interest in "preventing the actual or apparent corruption of the political process." *Id.* at 197, 101 S.Ct. at 2722. The plurality feared that actual or perceived corruption would arise if individuals and unincorporated associa-

[19] Arkansas currently has 35 senate districts.

tions were able to channel unlimited funds through PACs to candidates, thereby circumventing the $1000 limit on contributions to individual candidates. *Id.* at 198, 101 S.Ct. at 2722-23. Further, the Court reasoned that when a contributor's First Amendment rights are not infringed by limits on his contributions to a candidate's campaign, those rights "are similarly not impaired by limits on the amount he may give to a multicandidate political committee. . . ." *Id.* at 197, 101 S.Ct. at 2722.

The plaintiffs point out that FECA limited contributions to candidates to $1000 per election, and contributions to PACs to $5000 per year. They then suggest that it would be irrational for Arkansas to limit contributions to PACs to only $200 per year while allowing $300 contributions to individuals per election. The defendants counter that the 1990 limit allows substantial participation in Arkansas' elective process while serving to prevent circumvention of the limits imposed on individual contributions. Citizens add that a limit on contributions to PACs is even more warranted in Arkansas than under the federal scheme. They note that the federal PACs in *California Medical* were required to enlist at least fifty contributors and contribute to no fewer than five candidates. *Id.* at 185 n. 1, 101 S.Ct. at 2716 n. 1. Arkansas imposes no such requirements. Similarly, Citizens argue, Arkansas has no corollary to FECA's $25,000 annual limitation on total contributions by an individual. See *Buckley*, 424 U.S. at 38, 96 S.Ct. at 644.

Having determined that Act I's $300 per election limit on contributions to candidates for statewide race are unconstitutionally low, this Court is sympathetic to the argument that a $200 limit on annual contributions to PACs is similarly infirm. This view finds support in *Day v. Holahan*, 34 F.3d 1356 (8th Cir.1994). In *Day*, the court deemed unconstitu-

tional a Minnesota law limiting contributions to a political committee or political fund to no more than $100 per year. The *Day* court recognized the state's compelling interest in avoiding "corruption or the appearance of corruption in the political process that could result from large amounts of special interest money circulating in the system. . . ." *Id.* at 1365. However, it declared that "the fighting issue" presented was whether the $100 limit had been narrowly tailored to serve that interest, in the light of the burden it placed on political speech. *Id.* The court based its finding that the limit was too low to allow meaningful participation in protected political speech and association on: the reduced danger of actual or perceived corruption when contributions are to a political committee rather than a candidate; the fact that $100 in 1994 dollars was a scant four percent of the $1000 limit upheld in *Buckley*; and the fact that one-fourth to one-third of the Appellant political fund's contributions in the previous election cycle had exceeded $100. *Id.* at 1365-66.

I find *Day* distinguishable and conclude that the $200 limit is constitutional. I am impressed by the fact that even though the limit has been in place since 1990, the plaintiffs do not contend that this limit has significantly infringed their First Amendment rights. In fact, much of the evidence in this case supports the conclusion that PAC contributions to candidates in Arkansas have been robust and that the $200 limit has not prevented "political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21, 96 S.Ct. at 636. Thus, unlike *Day* where the court was left to speculate on the effect of the challenged amendments to Minnesota's campaign finance laws, this Court is able to consider the impact of a law that has been in effect for a number of years, and the evidence reflects no appreciable infringement.

D. Deference to Initiated Acts

Citizens urges the Court to accord substantial deference to the voters' judgment in approving Act I, which they contend is an essentially legislative determination. They cite *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. at 665-66, 114 S.Ct. at 2470-71: "[C]ourts must accord substantial deference to the predictive judgments of Congress." The proponents of the challenged act in *Carver* advanced the same argument. The *Carver* court rejected this argument: "First, . . . the voters may no more violate the Constitution than the legislature[,]" and "[s]econd, the deference to legislative enactments recognized in *Turner Broadcasting System* requires that courts ascertain that the legislative body 'has drawn reasonable inferences based on substantial evidence.'" 72 F.3d at 644 (internal citations omitted). The court explained: "There is simply no evidence in the record identifying the source of Proposition A, whether it was an individual or a group, the process of its development, nor the reasons for the particular dollar limits. Further, there is no evidence of the details of the campaign waged in support of the initiative." *Id.* The court continued:

> Whether the deference *Turner Broadcasting System* requires for acts of Congress extends to the acts of the state legislative body is an issue not before us to decide. Legislative bodies consist of elected representatives sworn to be bound by the United States Constitution, and their legislative product is subject to veto by the elective executive, either President or Governor. The process of enactment, while perhaps not always perfect, includes deliberation and an opportunity for compromise and amendment, and usually committee studies and hearings. These are substantial reasons for according deference to legislative enactments that do not exist

> with respect to proposals adopted by initiative. On the evidentiary showing before us, there is no justification to accord Proposition A the deference that [*Turner*] requires for congressional action.

Id. at 644-45 (internal citation omitted). In this case there was some evidence regarding the drafting of the Act, and the campaign (as will be discussed in the next section, some of the supporting campaign literature contained a constitutionally impermissible reason for supporting Act I). Nonetheless, neither the Supreme Court nor the Eighth Circuit has held that special deference should be given to *state* laws. Regardless of the force of the argument one might make, in the abstract, for deference to a direct vote of the electorate, the above quoted language from *Carver* clearly suggests that no such deference may be given.

Still, I understand that federal courts must be careful to not unnecessarily declare state laws invalid, whether enacted by legislature or by the voters themselves. In the interest of comity, although I have found Act I constitutionally infirm in part, I have done so with "considerable pause and deliberation." *National Black Police Ass'n v. District of Columbia Bd. of Elections & Ethics*, 924 F.Supp. 270, 285 (D.D.C.1996), vacated, 108 F.3d 346 (D.C.Cir.1997).

E. Equal Protection Claim

Plaintiff AIAPAC argues that limiting approved PAC contributions to $100 and $300 per election, yet allowing small donor PACs to contribute $2500, treats similarly situated entities unequally and violates the Fourteenth Amendment. The Defendants and Citizens respond that this plaintiff's rights are unimpaired because its members are free to form a small donor PAC separate from AIAPAC.

As stated above, the Supreme Court has held that "statutory classifications impinging upon [the right to engage in political expression] must be narrowly tailored to serve a compelling governmental interest." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666, 110 S.Ct. 1391, 1401, 108 L.Ed.2d 652 (1990). In *Austin*, the Court was faced with an equal protection claim involving a Michigan statute prohibiting corporations from spending treasury funds for independent expenditures on behalf of political candidates. The Chamber of Commerce complained that unincorporated associations and media corporations were not similarly burdened. The Court upheld the statute because it was "precisely tailored" to serve the compelling state interest of preventing corporations from exploiting legal advantages to amass political "war chests." *Id.*

In *California Medical*, the Court decided an equal protection claim where FECA permitted labor unions and corporations to contribute to a separate segregated fund for political purposes, but restricted contributions by individuals and unincorporated associations to multicandidate political committees. The Court determined that to prevail in its claim the plaintiff would need to satisfy a two-part analysis. First, the plaintiff would have to show the act burdened the First Amendment rights of individuals and unincorporated individuals to a greater extent than those of labor unions and corporations. Second, it would have to prove that this differential treatment was not justified. 453 U.S. 182, 200, 101 S.Ct. 2712, 2724, 69 L.Ed.2d 567 (1981). Because the Court found no discrimination, its analysis ended without considering the issue of justifiability. The Court noted that FECA was far less restrictive to individuals and unincorporated associations than to corporations and unions. To illustrate, the Court observed that individuals and unincorporated associations were able to contribute to

candidates, to candidates' committees, and to national party and other committees, while corporations and unions could not. Moreover, multicandidate political committees could generally solicit as they pleased, while the manner and scope of solicitation by corporations and unions were "carefully limited" by FECA. *Id.* at 201, 101 S.Ct. at 2724. FECA's differing restrictions, reasoned the Court, "reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." *Id.*

The question of discrimination is a close one. I recognize that the ability to raise money from a single contribution strongly favors approved PACs over small donor PACs – $200 compared to $25, an eight-to-one ratio. Yet the ability to contribute to a single candidate may be seen as even more strongly favoring the small donor PAC over approved PACs – $2500 compared to $100, a twenty-five-to-one ratio. I conclude that this substantial disparity is balanced by the fact that small donor PACs can only receive contributions from individuals, while approved PACs may count among their donors other PACs, corporations, or unions. Furthermore, approved PACs are not limited in the total amount they can contribute overall, but only as to a single candidate. The Act I amendments do not burden the First Amendment rights of approved PACs to a more constitutionally significant extent than it burdens such rights of small donor PACs.

Moreover, even if the balance tipped in favor of small donor PACs, a heavier burden on approved PACs' First Amendment rights would be justified by the state's compelling interest in avoiding actual or apparent corruption. Act I's restricting small donor PACs to receiving no more than $25 in annual contributions from only individuals greatly

diminishes the potential for actual or perceived corruption that can accompany contributions from approved PACs. Just as in *California Medical*, these restrictions reflect the judgment of the voters that these two types of PACs have "differing structures and purposes," and that different forms of regulation are permitted. *Id.*

F. State Interest in Leveling the Playing Field

Some of Citizens' campaign literature for Act I raises a nettlesome question. It urged, among other things, the adoption of Act I "to level the playing field" for candidates with modest financial resources. Many would think that this is a perfectly proper, or even a laudable, goal. However, in *Buckley*, the Supreme Court stated, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." 424 U.S. at 48-49, 96 S.Ct. at 649. Scholars have challenged this language as "perhaps the most controversial and dubious statement" [20] in *Buckley*; however, neither the Supreme Court nor the Eighth Circuit has flinched since this passage was written in 1976. In *Shrink Missouri Government PAC v. Maupin*, the Eighth Circuit declared that "no subsequent decision of the [*Buckley*] Court has undermined that holding." 71 F.3d 1422, 1426 (8th Cir.1995). In *Carver*, the court warned that an amicus's suggestion that the state has a compelling interest in equalizing all citizens' ability to affect the outcome of elections was "close to running afoul of the Court's [above-quoted] statement in *Buckley* . . . ." 72 F.3d at 639 n. 6.

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[20]Jamin Raskin & John Bonifaz, Equal Protection and the Wealth Primary, 11 Yale L. & Pol'y Rev. 273, 320 (1993).

It is hard to understand how any law restricting the size of contributions (including the federal restrictions upheld in *Buckley*) would not have at least some tendency to level the playing field. Indeed, in a press release, Citizens noted that Act I would "help to level the political playing field by placing strict limits on campaign contributions and increasing the power of small donors through tax credits and the creation of small donor political action committees." However, the bulk of the Act I campaign literature appears to focus on the purpose of curbing the influence of special interests through large contributions, and "ending the cozy relationship of big money political contributions and incumbent politicians." Thus, the aim of leveling was apparently not the primary element of the campaign for Act I, and, on its face, the Act does not reveal leveling as its purpose.

In a similar vein, the plaintiffs warn that implementation of Act I's limits will increase the advantage enjoyed by wealthy candidates over their less affluent opponents: candidates with personal wealth and the inclination to spend it on campaigns will not be hampered by having to raise money at even more limited levels or by having to worry about their opponent's greater access to costly media outlets. In fact, some of the defendants' and Citizens' witnesses conceded that Act I would likely increase this advantage, one that is apparently inherent to our electoral system. I believe that additional limits on campaign contributions will add to the wealthy candidate's edge. However, in *Buckley* the Supreme Court addressed the issue of limiting the amount of money a candidate could contribute to her own campaign. The Court held that "the First Amendment simply cannot tolerate [FECA's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." 424 U.S. at 54, 96 S.Ct. at 651. The Court reasoned that the government's interest in preventing actual

or perceived corruption did not support such a limitation when the funds involved come from the candidate or the candidate's immediate family. *Id.* at 53, 96 S.Ct. at 651. While *Buckley's* reasoning has been questioned by some commentators,[21] it is the law that the state cannot limit a candidate's contributions of her own money to her campaign. Just as the poor will apparently always be with us,[22] it appears that, in politics, so will the wealthy. Any limits on contributions will tend to favor the wealthy, but, under *Buckley*, this cannot be avoided, and this fact will not void otherwise valid limits.[23]

G. Severability

Severability is a matter of state law. *Leavitt v. Jane L.*, 518 U.S. 137, ___ , 116 S.Ct. 2068, 2069, 135 L.Ed.2d 443 (1996). The Arkansas Supreme Court has instructed, "[i]n determining whether the invalidity of part of the act is fatal to the entire legislation, we have looked to (1) whether a single purpose is meant to be accomplished by the act; and (2) whether the sections of the act are interrelated and dependent upon each other." *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W.2d 349, 357 (1994). The court further explained that "it is important whether the portion of the act

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[21]See e.g., Raskin & Bonifaz, supra, at 31531.

[22]St. John 12:8.

[23]In Justice White's view, a long-time minority view, as noted earlier, reasonable restrictions could be placed on a candidate's personal contributions to her own campaign. *Buckley*, 424 U.S. at 266, 96 S.Ct. at 748-49. Also, the Eighth Circuit has upheld election laws that encourage "voluntary" expenditure limits by candidates. *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996). Still, nothing is clearer in *Buckley* than the prohibition against government limits on personal spending. Buckley, 424 U.S. at 52-54, 96 S.Ct. at 651.

remaining is complete in itself and capable of being executed wholly independent of that which was rejected. Clearly, when portions of an act are mutually connected and interwoven, severance is not appropriate." *Id.* 872 S.W.2d at 358. Courts will consider the presence of a severability clause in an act, but this may not be determinative of itself. *Id.* Act I contains the following severability clause:

> **Section 15.** If any provision or section of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or applications, and to this end the provisions of the act are declared to be severable.

The Court's ruling here has: upheld Act I's $100 per election contribution limit for elections involving non-statewide races (with the exception of the positions of Supreme Court Justice and Court of Appeals Judge); ruled unconstitutional the Act's $300 per election contribution limit on statewide races; upheld the preexisting $200 per annum contribution limit to PACs; and upheld the small donor PACs against the plaintiffs' challenge on equal protection grounds. Additionally, the Court has found the plaintiffs' challenge of Act I's provision for lower local contribution limits nonjusticiable for lack of ripeness. Finally, the Court has held that the plaintiffs lack standing to challenge Act I's provision for independent expenditure committees. The effect of this ruling leaves Act I intact, with the exception of the contribution limit for statewide races, and the application of the $100 limit to contributions to candidates for Supreme Court Justice and for Judge of the Court of Appeals.

Applying the *U.S. Term Limits* test, I find no single purpose behind Act I with which this Court's ruling will

unduly interfere. Similarly, I see no fatal interrelation or interdependency between the stricken and upheld portions of the Act. In other words, I see no reason not to honor the intent of the drafters of Act I that, to the extent possible, the various provisions of the Act should stand on their own. As to elections for Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, Commissioner of State Lands, Court of Appeals Judge and Supreme Court Justice, the $1000 contribution limit applicable prior to Act I will continue to apply.

Conclusion

In summary, the Court finds the following sections of the Arkansas Code constitutional: section 7-6-203(a)(1) and (b)(1), except as it applies to the offices of Supreme Court Justice and Court of Appeals Judge; section 7- 6-201(9)(B); and sections 7-6-201 and 7-6-203(d). The Court declares unconstitutional, and thus enjoins the enforcement of, the following sections of the Arkansas Code: section 7-6-203(a)(2) and (b)(2); and section 7-6-203(a)(1) and (b)(1) as it applies to the offices of Supreme Court Justice and Court of Appeals Judge. Further, the Court finds that the plaintiffs lack standing to challenge Arkansas Code sections 7-6-201(13) and (14), and 7- 6-203(k). The plaintiffs' challenge to Arkansas Code section 7-6-224 is dismissed because it is not ripe.

IT IS SO ORDERED.

WILSON, District Judge.

Supreme Court, U. S.
FILED
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No. 98-397 and 98-399

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

TROY BURRIS, in his official capacity as chairperson of the Arkansas Ethics Commission and JACK KEARNEY, TOM ALEXANDER, RITA LOONEY, and BEN ALLEN, in their official capacities as members of the Arkansas Ethics Commission ..... *Petitioners*

and CITIZENS FOR CLEAN GOVERNMENT ..... *Intervenor*

vs.

RON RUSSELL, KENT INGRAM, WILLIAM R. AUSTIN, and ASSOCIATED INDUSTRIES OF ARKANSAS POLITICAL ACTION COMMITTEE ..... *Respondents*

CITIZENS FOR CLEAN GOVERNMENT ..... *Petitioner,*

vs.

RON RUSSELL, KENT INGRAM, WILLIAM R. AUSTIN, and ASSOCIATED INDUSTRIES OF ARKANSAS POLITICAL ACTION COMMITTEE

–and–

TROY BURRIS, in his official capacity as chairperson of the Arkansas Ethics Commission and JACK KEARNEY, TOM ALEXANDER, RITA LOONEY, and BEN ALLEN, in their official capacities as members of the Arkansas Ethics Commission, ... *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

WHETHER ARKANSAS' $100 AND $300 PER ELECTION PER CANDIDATE CONTRIBUTION LIMITS TO CANDIDATES, ITS $200 ANNUAL CONTRIBUTION LIMIT TO APPROVED POLITICAL ACTION COMMITTEES, AND ITS $2,500 PER CANDIDATE PER ELECTION CONTRIBUTION LIMIT FROM SMALL DONOR POLITICAL ACTION COMMITTEES TO CANDIDATES VIOLATE THE FIRST AMENDMENT OR THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

LIST OF PARTIES TO THE PROCEEDING

The parties to this case are as follows: The Respondents are Ron Russell, Kent Ingram, William R. Austin, and Associated Industries of Arkansas Political Action Committee. The Petitioners in Case No. 98-399 are Troy Burris, Chairman of the Arkansas Ethics Commission, Rita Looney, Tom Alexander, Ben Allen, and Jack Kearney, Arkansas Ethics Commissioners, and the Petitioner in Case No. 98-397 is Citizens For Clean Government.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Chairman and Members of the Arkansas Ethics Commission (hereinafter referred to as the State) and Citizens for Clean Government, Intervenor below, (hereinafter referred to as Citizens) have separately filed Petitions for a Writ of Certiorari in this Court. Since both petitions arise out of the same case and both petitions make similar arguments, Respondents will respond to both petitions in this pleading.

As required by Rule 15, Respondents call to the Court's attention that the Statement of the Case presented by Citizens incorrectly treats this as a public subsidy case and states that there is public funding that could reach $50 million annually in Arkansas caused by a $50 per individual income tax credit ($100 for joint filers) authorized by Act I. The tax credit is not public funding as it only provides a tax credit for state income taxpayers who contribute to political candidates, parties, and Political Action Committees. Arkansas law does not provide for payment of any funds by the government to any candidate. Furthermore, there is no evidence in the record of the number of taxpayers affected or the amount they would claim as a credit. Other factual and legal distinctions will be discussed in the argument portion of this Response.

For purposes of this response, Respondents accept the Statement of the Case presented by the State, except when it infers that the tax credit is a "public subsidy."

ARGUMENT

THERE ARE NO COMPELLING REASONS TO GRANT THE WRIT.

Respondents contend there are no compelling reasons for this Court to exercise its judicial discretion to grant the writ. First, there is no conflict among the circuits or decisions of this Court as every case cited, including this case, followed *Buckley v. Valeo*, 424. U.S. 1 (1976). Secondly, the Eighth Circuit did not decide an important federal question in a way to conflict with a state court of last resort, and, thirdly, the Eighth Circuit has not departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court. Finally, the Eighth Circuit has not decided an important question of federal law that has not been settled by this Court. *Buckley, supra*, only twenty-two years old, settled all questions raised by Petitioners.

This case was correctly decided by the Eighth Circuit after applying the principles of *Buckley, supra*, to the facts presented during a seven-day trial. The petitioners simply do not like the results of this factual review.

A. THIS IS NOT A CASE INVOLVING PUBLIC FUNDING OF CAMPAIGNS

Respondents make three initial observations about statements in the Petitions which leave the wrong impression of what this case is about. First, Citizens attempt to make this a public subsidy case. In their Petition the term "generous public campaign subsidy" is used. This is not a public subsidy case. A public subsidy is a direct payment from the government to the candidate or his campaign of governmental funds. Usually a public subsidy is associated

with something in return from the candidate or campaign, i.e., spending limits, contribution limits, or other restrictions on the candidate or his campaign, with an added provision that the candidate can opt out of the program. There are no such provisions in Arkansas law.

Here the "generous public subsidy" is a tax credit of up to $50.00 to an individual or $100.00 to joint filers. This tax credit only benefits the contributor who makes a political contribution. No public funds go to a candidate or his or her campaign. Indeed, even if one assumed for the sake of argument that the tax credit was a form of an indirect public subsidy, an individual candidate may never receive any benefit from the "indirect public subsidy" because the candidate may not receive a contribution from a taxpayer, or the taxpayer may have already given contributions in excess of his tax credit.[1] In addition, the candidate has to compete with political parties and political action committees for contributions as well as other candidates. In Arkansas there will be 5,926 offices filled in 1998. Many of the candidates had opponents in the party primaries, and many will have general election opponents. The irony of the tax credit is that it does not include any benefit for low to moderate income individuals in Arkansas who do not pay Arkansas income taxes.

In addition to incorrectly referring to the tax credit as a "generous or huge public subsidy," Citizens leaves the impression that more than one million taxpayers may contribute $50 million into political speech by making contributions. There is no evidence of any benefit from the

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[1]Since Arkansas has elections for many offices every two years, many candidates and officeholders will be encouraged to have a perpetual fund-raising effort in order to allow contributors to utilize their off election year tax credit.

tax credit, and any number advanced is pure speculation.[2]

The third observation is that Act I was advanced as an attempt to meld campaign subsidies and contribution limits into "an innovative, integrated system of campaign finance regulation that both prevents corruption and enhances political equality, while emphasizing the importance of individual participation." (Citizens Petition, p. 5) In fact, the campaign for Act I emphasized leveling the playing field by (1) ending corruption by "big" money by limiting contributions to $300 and $100, (2) increasing participation in the political system by creating the tax credit and Small Donor PACs, and (3) bringing more sunshine by adding lower disclosure provisions. The proponents emphasized that their concern was that winners raise more money than losers, incumbents raise more than challengers, and incumbents receive more contributions from special (business) interests, which they argue gives the appearance of corruption.

The Eighth Circuit held that Act I provided a subsidy and limitation scheme of sorts, but not the type approved in *Buckley*. *Buckley* approved the presidential campaign finance system that disallows contributions to the candidate after nomination in return for receipt of a set amount of dollars from the federal government for the general election.[3] The Eighth Circuit is correct.

Both petitions incorrectly state that the Eighth Circuit created a new standard of proof that imposes "an impossibly

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[2] The tax credit in Arkansas is not like the tax refund in Minnesota that was testified to at trial as the Minnesota tax refund program allows the contributor to receive a refund from general revenue, even if he does not have an income tax liability.

[3] That amount, $20 million in 1976, gave each of the major party candidates the same amount to spend on the general election campaign. The amount is adjusted annually for inflation.

stringent burden of justification of Arkansas' decision to adopt a $300 contribution ceiling in most statewide races and a $100 cap in other races" by requiring proof that contributions marginally in excess of $300/$100 had functioned as bribes, causing public officials to alter their official behavior. The Eighth Circuit simply held that the evidence offered to justify the low limits was insufficient. The Eighth Circuit held that a $1,000 campaign contribution, in itself, does not have an appearance of corruption, that $1,000 is not a large contribution as defined by *Buckley, supra*, that the limits were not narrowly tailored, and that the $300/$100 limits were a difference in kind from the limits allowed in *Buckley*.

In discussing the evidence, the Eighth Circuit pointed out types of evidence that might lead to a perception of undue influence or the appearance of corruption. A change of position following a large contribution or an effort to secrete a large contribution might give rise to the appearance of corruption spawned by a large contribution. However, here there was no individual contribution over three election cycles in excess of the $1,000 limit, no evidence proving that the official actions of any official was affected by a political contribution, and no evidence that any effort was made to conceal any contribution.[4] The Eighth Circuit is correct in its analysis because *Buckley* states that the compelling state interest is "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of *large* financial contributions on *candidates' positions and on their actions if elected to office*." (emphasis added) Only when this test is met may limits be enacted, and they must be narrowly tailored to address the harm.

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[4]Arkansas law, prior to Act 1, required any contribution or aggregate of contributions from any person of over $100 to be disclosed.

Act I was not intended to be comprehensive campaign finance reform. It did not address soft money. It did address independent expenditures by committees formed to support or oppose a clearly identified candidate by limiting contributions to $500 annually to the committee,[5] but not other independent expenditures. It did not address true public financing of campaigns in return for spending limits. Act I was intended to limit the First Amendment rights of some in order to enhance the position of others.

B. THE EIGHTH CIRCUIT FOLLOWED THE STANDARDS ANNOUNCED IN BUCKLEY V. VALEO AND CALIFORNIA MEDICAL ASSOCIATION V. FEDERAL ELECTION COMMISSION (CAL-MED)

An analysis of the Eighth Circuit's opinion demonstrates that it addressed the issues raised in the Petitions and correctly rejected them.

(a) Strict scrutiny is the proper standard

In its analysis, the Eighth Circuit first determined that the appropriate standard for review of the Government's attempts to limit campaign contributions is strict scrutiny. The Eighth Circuit rejected the argument that a more lenient standard of review was required because the Act included not only contribution limits but also a "public subsidy" scheme. The "public subsidy" scheme is not a subsidy

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[5]Although Respondents were found to lack standing to attack this provision, another case decided on the same day where standing exists challenges that provision. *Arkansas Right to Life State Political Action Committee v. Butler*, Case No. 98-1215 and 1218 (8th Cir., June 4, 1998). The Eighth Circuit affirmed the finding that the $300 contribution limit was unconstitutional and remanded the other issues that had not been decided to the District Court. No Petition for Writ of Certiorari was filed from the Eighth Circuit decision.

at all, as it does not provide for the transfer of any money to any candidate, but is in reality a tax credit against Arkansas State Income Tax. The tax credit is designed to encourage contributions to political candidates, PACs or political parties by more people. Tax credits and deductions are not a new idea. At one time Arkansas allowed a tax deduction for certain political contributions. The Eighth Circuit pointed out that the Court had approved a voluntary campaign subsidy and limitation scheme in Minnesota because that scheme presented candidates with an additional optional campaign funding choice with participation being voluntary. *Rosentiel v. Rodriguez*, 101 F.3rd 1544, 1552 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1820, 1337 L.Ed.2nd 1028 (1997). The Court distinguished the schemes upheld in *Buckley* and *Rosentiel* from the Act I scheme because Act I was imposed upon all candidates and no candidate had the power to opt out. They declined to apply a standard of scrutiny to this case different from the one adopted in *Carver v. Nixon*, 72 F.3d 633, 636 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033, 116 S.Ct. 2579, 135 L.Ed.2d 1094 (1996), *Buckley v. Valeo, supra*.

The Court also held that what Petitioners tried to identify in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364, 1370, 137 L.Ed.2d 589 (1997) as a weighing test, rather than strict scrutiny, was no more than a restatement or reformulation, not a modification, of the Supreme Court's familiar strict scrutiny analysis and rejected the argument that imposed a lesser burden than exacting review and pointed out that *Timmons* reiterated that strict scrutiny applies.

(b) The compelling state interest identified is correct

The Eighth Circuit next quoted *Buckley, supra*, in identifying the compelling State interest as "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial con-

tributions on candidates' positions and on their actions if elected to office." *Buckley*, 424 U.S. at 25. See also, *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296-97, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981), *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985). Applying this standard to the facts before it, the Court first found that there had been no "credible evidence of actual undue influence or corruption stemming from large contributions." *Russell v. Burris, supra* (State App. A-11). The Court made an independent examination of the whole record and specifically found, "that $1,000 is simply not a large enough sum of money to yield, of its own accord without further evidence, a reasonable perception of undue influence or corruption." *Russell v. Burris, supra* (State App. A-12, 13) In a strictly fact oriented discussion, the Court explained that the Petitioners, by pointing to the identity of the contributors and their subsequent interest in legislation, are not complaining about the size of the contributions, but who contributes. The Court concluded that there was insufficient evidence to establish a reasonable perception of undue influence or corruption spawned by large contributions. There was no contribution over the legal limit in Arkansas of $1,000 per election during the three election cycles examined.

(c) The Eighth Circuit's review of the evidence is correct

The Petitioners incorrectly argue that the Eighth Circuit required the Petitioners to prove that a candidate or office holder changed his position due to an intervening contribution or attempted to conceal his contribution or that there had been some exorbitantly large (in Arkansas illegal) contribution in order to meet the burden of a reasonable perception of undue influence or corruption caused by large contributions. In fact, what the Court found was that there was insufficient evidence to support a reasonable percep-

tion of undue influence or corruption. The Court suggested the type of evidence which may give a reasonable perception of undue influence or corruption that was not present in this case. The Court in no way attempted to establish any new standard. It simply pointed to the deficiencies in the evidence before it.

(d) Act I contributions are too low

The Eighth Circuit found that the candidate contribution limits in Act I are too low to allow meaningful participation in protected speech and association just as they found in *Carver v. Nixon*, 72 F.3rd at 641-42. The $1,000 contribution limit approved in *Buckley* has eroded approximately 60% of the value of the dollar since 1976. Therefore, a $1,000 contribution in 1976 is about the same as a $2,500 contribution in 1998. The limits prescribed by Act I, adjusted for inflation, are approximately 4% or 12% respectively of the limits upheld in *Buckley*. The Court, following its earlier reasoning in *Day v. Holohan*, 34 F.3d 1356 (8th Cir. 1994) *cert. denied*, 513 U.S. 1127 (1995), and *Carver v. Nixon, supra*, found that the limitations in Act I are a difference in kind from the limits upheld in *Buckley* and are unconstitutionally low.

(e) Act I contribution limits are not narrowly tailored

The Court held that even if there were a compelling state interest in preventing the perception of corruption or undue influence due to any of the various concerns identified by the Petitioners, Act I was not narrowly tailored to address those concerns. The Court found Act I to be both overinclusive and underinclusive by limiting the free speech of all who would contribute without addressing specific concerns identified.

It is axiomatic that since there were no large contributions in Arkansas (i.e., over $1,000) prior to Act I, there was no evidence of a harm to be corrected. Therefore, there

was no way to narrowly tailor contribution limits to address a harm. The harm identified by the Petitioners was the source of the contribution (business interests), not the amount of the contribution.

The Eighth Circuit specifically followed the Supreme Court decisions, and the Petitioners are in error in asserting that they departed from *Buckley* in their analysis.

(f) The Eighth Circuit correctly followed Cal-Med

Petitioners complain that the Eighth Circuit did not follow *Cal-Med* when it found unconstitutionally discriminatory the provision in Act I permitting a Small Donor Political Action Committee to give as much as $2,500 to a candidate in contrast to limiting an Approved PAC to $100 and $300 per election per candidate[6] and in its finding that a $200 annual contribution limit to an Approved PAC violates the First Amendment.

To the contrary, the Eighth Circuit specifically found that the Plaintiffs below met the requirements set forth in *Cal-Med*, that they are burdened to a greater extent by this provision than Small Donor PACs are, and rejected the argument that just because a Small Donor PAC raised money in contributions of $25 or less the discrimination was allowable. That argument focuses on the source of the funds given to a PAC rather than on the entity from which the candidate receives the funds. The Court recognized the possibility that a Small Donor PAC itself could seek to control a given candidate and that a $2,500 contribution would be even more likely to exacerbate this difficulty than a $1,000 contribution from other contributors. The Court stated, "If any contribution is likely to give rise to a reason-

[6]The Eighth Circuit's holding returns these limits to $1,000.

able perception of undue influence or corruption, it would be one from an entity permitted to contribute two-and-a-half times the amount that most others are allowed to contribute." This certainly supported the finding that the Small Donor PAC provision is not narrowly tailored to serve the compelling governmental interest of combating the reality or the perception of undue influence.

The analysis of the $200 annual contribution limit to an Approved PAC properly followed *Cal-Med.*[7] The Court reasoned that the limit was not narrowly tailored to serve a compelling state interest because the limit is so low as to be different in kind from the limit approved in *Buckley*. The limit is only 8% of the *Buckley* limit in 1998 dollars, and 5%, before adjustment for inflation, of the $5,000 limit approved in *Cal-Med* in 1981.

C. THE EIGHTH CIRCUIT PROPERLY REJECTED PETITIONERS' ASSERTION THAT ADDITIONAL COMPELLING STATE INTERESTS WERE IDENTIFIED SUFFICIENT TO LIMIT FIRST AMENDMENT RIGHTS

Finally, we get to the heart and soul of the Petitioners' argument, i.e., *Buckley* should be revisited in order to identify another compelling interest justifying infringement of First Amendment rights, i.e., leveling the playing field.

Act I was not campaign finance reform, narrowly tailored to correct a problem and address a compelling state interest. It was an attempt to change the electoral process by taking away First and Fourteenth Amendment rights of some citi-

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[7] The $200 limit was part of a 1990 Initiated Act, which also lowered the contribution limit for candidates from $1,500 as enacted by the legislature to $1,000.

zens in order to grant large membership groups enhanced rights with the goal of leveling the playing field. *Buckley, supra*, rejects leveling the playing field as a compelling state interest. Petitioners ask this Court to change its prior rulings as to the sanctity of the First and Fourteenth Amendments and declare that the mere possible future inclusion of people not presently involved in the electoral process overrides the rights of individuals presently involved in the electoral process. Petitioners request that this Court establish this to be a compelling state interest. However, even if the Court recognized the possible inclusion of a greater portion of citizens in the electoral process to be a compelling state interest sufficient to allow curtailment of the rights of participation of other citizens, there was insufficient evidence at trial to establish that Act I would have that effect.

The contribution limit in Arkansas before Initiated Act I was $1,000. Act I gave Small Donor Political Action Committees the right to contribute $2,500 to a candidate. Act I reduced the $1,000 limit on all other persons or PACs to $300 and $100. The purpose of the Act was patently to change the direction and grant a favored status to large membership groups at the cost of reducing others' First Amendment rights. In order for this Court to reverse the Eighth Circuit, this Court would have to greatly modify its position established in *Buckley*.

The "wealth primary" argument is equally deficient. There is no evidence in the record to support a finding that prior Arkansas contribution limits denied any person access to the ballot as either a candidate or voter. In fact, the evidence reflected that ACORN members had run successfully for office. Furthermore, the tax credit and authority to establish a Small Donor PAC were not challenged and are still the law. If those provisions enhance candidate and voter participation, the goal of the proponents will be met.

Petitioners have attempted to establish that a state of confusion exists as to the interpretation of *Buckley* by excerpting, out of context, certain quotations and findings from various cases involving First and Fourteenth Amendment rights. Each cited is readily distinguished from the case at hand. The only thread which runs constantly through all of these cases is an adherence to the principles set forth in *Buckley*. In none of the cases relied upon by the petitioners are the facts remotely similar to those in the case at hand.

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990); *Colorado Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996); *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985); *First National Bank of Boston v. Belloti*, 435 U.S. 765 (1978) are all cases involving limits on campaign expenditures. There is no question involving expenditure limits in the case at hand.

Burdick v. Takushi, 504 U.S. 428 (1992) concerned a state ban on write-in votes.

CSC v. Letter Carriers, 413 U.S. 548 (1973) and *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), were cases involving the First Amendment rights of government employees.

Timmons v. Twin Cities Area New Party, supra, was concerned with a state ban on fusion or unwanted association on the ballot.

Vannetta v. Keisling, 899 F.Supp. 488 (D. Ore. 1995) affirmed No 95-35998, 1988 WL 461920 (9th Cir. Aug. 11, 1998) struck down a state ban on out-of-state contributions.

California ProLife Council PAC v. Scully, 989 F.Supp. 1282 (E.D. Cal. 1998); and *Federal Election Commission v. National Conservative Political Action Committee, supra*, involved public finance of election campaigns.

In all cases cited involving contribution limits, either the limits were found to be unconstitutional or limits were approved which were in excess of the Arkansas $1,000 limit. *Buckley* when applicable, has been faithfully followed.

CONCLUSION

Act I was a misconceived idea based on the false assumption that there is something inherently wrong with meaningful participation by citizens in the political process by making campaign contributions to those they support. Political campaigns have become more expensive over the years, but there is still a need to get the message out. It takes money to get the message out and run a campaign. Drastic low contribution limits are a form of spending limits because many people do not make political contributions. Since 1976 *Buckley* has guided legislatures, citizens, and courts in their analysis of campaign finance reform. In the instant case,the *Buckley* principles were followed to the letter. Act I was found to violate the First and Fourteenth Amendment rights of the Respondents. In so finding, no new principles were established, just the ones identified in *Buckley*. There is no conflict between the circuits and no important issues that need to be addressed by this Court. Even if the Court was inclined to review a campaign finance case, this is not the right case. This case does not include many issues that would be part of a comprehensive campaign finance case and does not seek to go beyond the principles announced in *Buckley*.

None of the considerations governing review on certiorari identified in Rule 10 of the Rules of the Supreme

Court of the United States are present in this case.

For the reasons set forth in this Brief, the Respondents respectfully request that the Court deny both Petitions for Writs of Certiorari.

Respectfully submitted,

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